No. 04-39 JUL 6 - 2004

In The

Supreme Court of the United States

MILDRED GOLLIE,

Petitioner,

v.

ELKAY MINING COMPANY, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the conflict in interpretation of 30 U.S.C. Section 921(c)(3) between the Fourth Circuit in *Double B Mining, Inc. v. Blankenship*, 177 F. 3d 240 (4th Cir. 1999) and the Sixth Circuit in *Gray v. SLC Coal Company*, 176 F. 3d 382 (6th Cir. 1991) presents an appropriate subject for grant of certiorari by this court.

LIST OF ALL PARTIES

1. The Petitioner is Mildred Gollie, with her attorney being Leonard Stayton, Attorney at Law, P.O. Box 1386, Inez, KY 41224.

2. The Respondent is Elkay Mining Company, with its counsel being Hon. Kathy Snyder, Attorney at Law, P.O. Box 619, Morgantown, WV 26507.

3. The second Respondent is the Director, Office of Workers' Compensation Programs, whose counsel is the Solicitor General, Hon. Theodore B. Olson, Office of the Solicitor General, Department of Justice, 950 Pennsylvania Avenue, NW, Room 5143, Washington, DC 20530, with counsel of record being Hon. Sarah M. Hurley, Attorney at Law, U.S. Department of Labor, Office of the Solicitor, 200 Constitution Avenue, NW, Suite N-2117, Washington, DC 20210.

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Mildred Gollie, widow of Joe Gollie, deceased, v. Elkay Mining Company, Director, Office of Workers' Compensation Programs, United States Department of Labor, 03-2131 (4th Cir. 4/8/04).

BRB Decision and Order, 7/31/03.

ALJ Decision and Order on Remand-Denying Benefits, 6/28/02.

BRB Decision and Order, 3/29/02.

ALJ Decision and Order on Remand-Awarding Benefits, 2/1/01.

BRB Decision and Order, 11/2/00.

ALJ Decision and Order, 7/30/99.

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The judgment sought to be reviewed was entered by the U.S. Court of Appeals for the Fourth Circuit on April 8, 2004. No motion for rehearing has been requested by any party. The statutory provision believed to confer on this Court jurisdiction is 33 U.S.C. § 921.

STATUTE INVOLVED IN CASE

30 U.S.C. § 921(c)(3)

"If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed

by chest roentgenogram, yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in category A, B, C in the international classification of radiographs of the pneumoconiosis by the National Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be."

STATEMENT OF THE CASE

This case involves a survivor's application for federal black lung benefits under Title IV of the Federal Coal Mine Health & Safety Act of 1969, as amended, 30 U.S.C. §§ 901-945. An initial administrative law judge decision was issued on July 30, 1999, finding that the claimant had established the presence of complicated pneumoconiosis based upon autopsy evidence of massive lesions in accord with 30 U.S.C. § 921(c)(3). (ALJ Decision and Order-Awarding Benefits, 7/30/99).

The employer appealed the favorable decision to the Benefits Review Board which issued a Decision and Order on November 2, 2000 vacating the administrative law judge's award of benefits and remanding the claim to the administrative law judge in order for the administrative

law judge to perform an equivalency determination as required by the Fourth Circuit's decision in *Double B. Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999).

Upon remand, the administrative law judge again awarded benefits, finding that the medical evidence did meet the equivalency determination for a finding of complicated pneumoconiosis as defined in the Act. (ALJ, Decision and Order-Awarding Benefits, 2/1/01). On March 29, 2002, the Benefits Review Board issued a Decision and Order finding that the medical evidence as set forth by the administrative law judge did not properly meet the equivalency determination as required by the Fourth Circuit and remanded the claim to the administrative law judge for further proceedings. (BRB Decision and Order, 3/29/02).

On June 28, 2002, the administrative law judge issued a Decision and Order on Remand, denying benefits. (Decision and Order on Remand-Denying Benefits, 6/28/02). The Benefits Review Board affirmed the administrative law judge decision on July 31, 2003. (BRB Decision and Order, 7/31/03).

The Petitioner then filed a Petition for Review with the U.S. Court of Appeals for the Fourth Circuit. The U.S. Court of Appeals for the Fourth Circuit denied the Petition for Review, adopting the reasoning of the Benefits Review Board in its 7/31/03 decision. *Gollie v. Elkay Mining Company*, 03-2131 (4th Cir. 4/8/04).

The basis for federal jurisdiction in the U.S. Court of Appeals for the Fourth Circuit was 33 U.S.C. § 921.

ARGUMENT

The Petitioner would submit that certiorari should be granted by this Court to review the decision of the Fourth Circuit in light of the fact that the Fourth Circuit's decision is in conflict with the decision of the U.S. Court of Appeals for the Sixth Circuit in *Gray v. SLC Coal Company*, 176 F.3d 382 (6th Cir. 1991) as well as being in conflict with the wording of the statute itself. 30 U.S.C. § 921(c)(3).

30 U.S.C. § 921(c)(3) provides three separate methods by which complicated pneumoconiosis may be established. Pursuant to the statute, complicated pneumoconiosis may be established if a chest x-ray yields one or more large opacities which would be classified in category A, B, or C in the international classification of radiographs of the pneumoconiosis by the National Labor Organization, when a biopsy or autopsy yields massive lesions in the lung, or when a diagnosis is made by other means, the condition is such that it could reasonably be expected to yield either large opacities as found on chest x-ray or massive lesions when diagnosed by biopsy or autopsy.

Although the statute specifically sets forth three separate means by which complicated pneumoconiosis may be established, the Fourth Circuit has held that, in determining whether complicated pneumoconiosis is present, 30 U.S.C. § 921(c)(3) requires that an equivalency determination be made as to whether the evidence supports a finding that massive lesions found upon either biopsy or autopsy would appear on a chest x-ray as opacities of at least one centimeter. *Double B. Mining v. Blankenship*, 177 F.3d 240 (4th Cir. 1999).

The U.S. Court of Appeals for the Sixth Circuit has specifically held that complicated pneumoconiosis may be

established by virtue of either a finding of opacities of greater than one centimeter on diameter on chest x-ray or by the showing of massive lesions by autopsy or biopsy. *Gray v. SLC Coal Company*. The Sixth Circuit's decision in *Gray* specifically notes that complicated pneumoconiosis may be established by the finding of massive lesions, without any requirement of an equivalency determination.

The claimant would submit that the Fourth Circuit, in arriving at its interpretation of 30 U.S.C. § 921(c)(3), has not given proper consideration to the use of the word "or" in the statute. The statute specifically provides that a finding of complicated pneumoconiosis may be made based either upon a finding of opacities greater than one centimeter in diameter on x-ray or the finding of massive lesions diagnosed by biopsy or autopsy. The statute specifically acknowledges that complicated pneumoconiosis may be proven based upon either a one centimeter or greater opacity on x-ray *or* a finding of a massive lesion by biopsy or autopsy.

In interpreting a statute, the starting point is, as always, the language of the statute. *Bank America Corp. v. United States*, 462 U.S. 122 (1983). The presence of statutory language cannot be regarded as mere surplusage, it must mean something. *Potter v. United States*, 155 U.S. 438 (1894). The words of a statute should be interpreted, where possible, in their ordinary everyday sense. *Crane v. Commissioner of Internal Revenue*, 331 U.S. 1 (1947).

The word "or" is noted by Webster's dictionary as a word which is used as a function word to indicate an alternative, such as "coffee *or* tea," "sink *or* swim". Webster's Seventh New Collegiate Dictionary, at 593. Thus, it is clear that the use of the word "or" in the statute indicates alternative

methods of proving the presence of complicated pneumoconiosis.

As there is no mention in the statute that massive lesions must be interpreted as being a lesion which would show up as being greater than one centimeter in diameter on chest x-ray, it is clear that Congress meant to establish two completely separate methods for the determination of complicated pneumoconiosis. By requiring the massive lesions portion of the statute to conform to the chest x-ray portion of the statute, one eliminates, in large part, one of the alternatives set forth by Congress for the establishment of complicated pneumoconiosis.

The Plaintiff would point out that the regulation is consistent with the statute, as the regulation only requires a finding of massive lesions, without an equivalency determination, in order to establish complicated pneumoconiosis. 20 C.F.R. § 718.304. Furthermore, a finding of progressive massive fibrosis as made by various examiners herein is equivalent to a diagnosis of complicated pneumoconiosis. This Court has specifically noted that complicated pneumoconiosis includes progressive massive fibrosis. *Turner Elkhorn Mining Company v. Usery*, 428 U.S. 1 (1976).

The Plaintiff would submit that the determination of complicated pneumoconiosis should be similar to the weighing of the various categories of pneumoconiosis in *Island Creek Coal Company v. Compton*, 211 F.3d 203 (4th Cir. 2000). In *Compton*, the Fourth Circuit noted that there were four separate means for the determination of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a) and held that the applicable evidence must be considered

under each separate category and then the conclusions from each category must be weighed together in order to determine whether pneumoconiosis is present.

The claimant would submit that this is the same approach as utilized by the Sixth Circuit in *Gray*. In *Gray*, the Sixth Circuit held that 30 U.S.C. § 923(b) required consideration of the medical evidence in each separate category applicable to the establishment of complicated pneumoconiosis. The Sixth Circuit held that all evidence from all applicable categories must be weighed together in order to determine whether complicated pneumoconiosis is present.

The claimant would further point out that 30 U.S.C. § 923(b) provides that unless there is good cause to believe that an autopsy report is not accurate, or that the condition of the miner is being fraudulently misrepresented, an autopsy report concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis is to be accepted. 30 U.S.C. § 923(b); *Bumgardner v. The Ohio Valley Coal Company*, 187 F.3d 634 (6th Cir. 1999).Thus, as there has been no showing of inaccuracy or fraudulent misrepresentation, the autopsy report from the pathologist should be accepted concerning the stage of advancement of the decedent's pneumoconiosis. Accordingly, as 30 U.S.C. § 923(b) specifically notes that the autopsy should be dispositive of the stage of advance ment of the pneumoconiosis, the autopsy findings, herein relative to the presence of progressive massive fibrosis should be binding without the requirement of an equivalency determination.

CONCLUSION

In order to resolve the conflict in the interpretation of 33 U.S.C. § 921(c)(3) between the Fourth Circuit and the Sixth Circuit, certiorari should be granted.

Respectfully submitted,

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APPENDIX

Mildred Gollie, widow of Joe Gollie, deceased, v. Elkay Mining Company, Director, Office of Workers' Compensation Programs, United States Department of Labor, 03-2131 (4th Cir. 4/8/04) .....App. 1

BRB Decision and Order, 7/31/03 .....App. 4

ALJ Decision and Order on Remand-Denying Benefits, 6/28/02 .....App. 16

BRB Decision and Order, 3/29/02 .....App. 21

ALJ Decision and Order on Remand-Awarding Benefits, 2/1/01 .....App. 32

BRB Decision and Order, 11/2/00 .....App. 40

ALJ Decision and Order, 7/30/99 .....App. 54

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2131

MILDRED GOLLIE, widow of Joe Gollie, deceased,

Petitioner,

versus

ELKAY MINING COMPANY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents.

On Petition for Review of an Order of the Benefits Review Board. (02-741-BLA)

Submitted: March 24, 2004
Decided: April 8, 2004

Before WIDENER, WILKINSON, and NIEMEYER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Leonard Stayton, Inez, Kentucky, for Petitioner. Douglas A. Smoot, Kathy L. Snyder, JACKSON KELLY PLLC, Morgantown, West Virginia, for Respondents.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Mildred Gollie seeks review of the Benefits Review Board's decision and order affirming the administrative law judge's denial of black lung benefits pursuant to 30 U.S.C. §§ 901-45 (2000). Our review of the record discloses that the Board's decision is based upon substantial evidence and is without reversible error. Accordingly, we affirm on the reasoning of the Board. *See Gollie v. Elkay Mining Co.*, No. 02-741-BLA (BRB July 31, 2003). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

JUDGMENT

(FILED: April 8, 2004)

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

NO. 03-2131
02-741-BLA

MILDRED GOLLIE, widow of Joe Gollie, deceased

Petitioner

v.

ELKAY MINING COMPANY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

On Petition for Review of an Order
of the Benefits Review Board.

In accordance with the written opinion of this Court filed this day, the Court enforces the order of the Board of July 31, 2003.

A certified copy of this judgment will be provided to the Agency upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

U.S. Department of Labor [LOGO]

Benefits Review Board
P.O. Box 37601
Washington, D.C. 20013-7601

BRB No. 02-0741 BLA

MILDRED GOLLIE (Widow of JOE GOLLIE) Claimant-Petitioner v. ELKAY MINING COMPANY, Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	) PUBLISHED)))))) DATE ISSUED:) JUL 31 2003))))))) DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand – Denying Benefits (97-BLA-0891) of Administrative Law Judge Daniel L. Leland on a survivor's claim[2] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[3] This case is before the Board for the third time. In the initial Decision and Order dated July 30, 1999, the administrative law judge noted that employer stipulated that the miner worked for thirty years in coal mine employment and suffered from simple coal workers' pneumoconiosis. The administrative law judge then found the evidence sufficient to establish the existence of complicated pneumoconiosis, and, therefore, sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis set out at 20 C.F.R. §718.304

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[1] Claimant is the surviving spouse of the miner, who died on June 8, 1996. The miner's death certificate, signed by Dr. Bae, indicates the cause of the miner's death was cardio-respiratory arrest, and that lung cancer and arteriosclerotic heart disease were underlying causes. Director's Exhibit 22.

[2] The miner originally filed a claim on July 31, 1990. Director's Exhibit 35. In a Decision and order dated November 1, 1995, Administrative Law Judge John C. Holmes noted that employer stipulated that the miner established the existence of simple pneumoconiosis. *Id.* Judge Holmes denied the miner's claim, however, based upon the miner's failure to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204 (2000) or the existence of complicated pneumoconiosis under 20 C.F.R. §718.304 (2000). *Id.* The miner took no further action in pursuit of benefits.

[3] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

(2000). Consequently, the administrative law judge awarded benefits. Employer appealed. The Board vacated the administrative law judge's finding that claimant was entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304 (2000), and remanded the case for reconsideration of all the relevant evidence in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Bethenergy Mines, Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996), as well as the Fourth Circuit's decisions in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, ___ BLR ___ (4th Cir. 1999), and *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).[4] *Gollie v. Elkay Mining Corp.*, BRB No. 99-1217 BLA (Nov. 2, 2000) (unpublished). The Board further instructed the administrative law judge to address the issue of etiology of the miner's pneumoconiosis at 20 C.F.R. §718.203(b) (2000), if reached. *Id.*

In a Decision and Order on Remand dated February 1, 2001, the administrative law judge found that none of the evidence which was previously developed in the miner's claim – *i.e.*, neither the x-ray evidence nor the pathological evidence – established invocation of the irrebuttable presumption under Section 718.304 (2000). However, the administrative law judge found the medical opinions of Drs. Naeye and Kleinerman, which are based upon a

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[4] Because the miner's coal mine employment occurred in West Virginia, the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

review of the autopsy slides, sufficient to establish invocation of the irrebuttable presumption under Section 718.304 (2000). The administrative law judge accorded greatest weight to the opinions of Drs. Naeye and Kleinerman on the basis that the two doctors are experts in the field of the pathology of occupational lung diseases. The administrative law judge also found that claimant established that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). Consequently, the administrative law judge awarded benefits. The Board vacated the administrative law judge's finding under Section 718.304 (2000), holding that the administrative law judge did not properly make the requisite equivalency determination in finding the opinions of Drs. Naeye and Kleinerman sufficient to establish invocation of the irrebuttable presumption. *Gollie v. Elkay Mining Corp.*, BRB No. 01-0507 BLA (Mar. 29, 2002) (unpublished). The Board remanded the case for the administrative law judge to reconsider all the relevant evidence and to determine its sufficiency to establish invocation of the irrebuttable presumption pursuant to Section 718.304 (2000).[5] *Id.*

On remand for the second time, the administrative law judge found the opinions of Drs. Naeye and Kleinerman

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[5] In vacating the administrative law judge's finding at 20 C.F.R. §718.304 (2000), the Board also vacated the administrative law judge's finding that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Gollie v. Elkay Mining Corp.*, BRB No. 01-0507 BLA (Mar. 29, 2002) (unpublished). The Board held that this finding, which was unchallenged on appeal, was subject to reinstatement by the administrative law judge, should he again find invocation of the irrebuttable presumption established at Section 718.304 (2000) on remand. *Id.*

insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis under Section 718.304, as neither doctor's opinion supported the requisite equivalency determination pursuant to *Blankenship*. The administrative law judge also found that the remaining pathologists' opinions do not support the requisite equivalency determination, and that, therefore, the evidence was insufficient to establish invocation of the irrebuttable presumption under Section 718.304. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that it is inappropriate for the Fourth Circuit to have adopted the equivalency determination standard for establishing complicated pneumoconiosis. Claimant further argues, in the alternative that, even if the equivalency standard is an appropriate legal standard, the administrative law judge improperly concluded that the opinions of Drs. Naeye and Kleinerman do not meet the standard. Finally, claimant contends that, because the court's holding in *Blankenship*, wherein the court held that an equivalency determination must be made, represents new law, this case should be remanded with both parties granted appropriate time for submission of evidence relative to the new standard. Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in the proceedings on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe*

v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

On appeal, claimant first contends that the equivalency determination analysis, applied by the administrative law judge on remand pursuant to the Board's remand instruction and the Fourth Circuit's decisions in *Scarbro* and *Blankenship*, is an inappropriate legal standard for determining the existence of complicated pneumoconiosis. Claimant argues that the Fourth Circuit's requirement that an equivalency determination analysis be made is inconsistent with 30 U.S.C. §921(c)(3), and the implementing regulations at Section 718.304(a)-(c), which provide for alternative methods for establishing complicated pneumoconiosis; namely, that a finding of complicated pneumoconiosis may be based upon either: (a) a finding of opacities greater than one centimeter on x-ray; (b) a finding of massive lesions diagnosed by biopsy or autopsy; or (c) a finding of a condition which could reasonably be expected to yield the results described in method (a) or (b) based upon a diagnosis made in accordance with acceptable medical procedures other than an x-ray, biopsy or autopsy. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). Claimant further argues that a determination of the existence of complicated pneumoconiosis pursuant to Section 718.304(a)-(c) necessitates that all relevant evidence be weighed, similar to the weighing of evidence under the various methods of establishing the existence of simple pneumoconiosis under 20 C.F.R. §718.202(a)(I)-(4), as mandated by the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Claimant asserts that, moreover, the equivalency determination is inappropriate where progressive massive fibrosis is established, since the United States Supreme Court noted in *Usery v. Turner*

Elkhorn Mining Co., 428 U.S. 1 (1976), that complicated pneumoconiosis involves progressive massive fibrosis, and because the regulatory definition of pneumoconiosis at 20 C.F.R. §718.201 includes progressive massive fibrosis.

Contrary to claimant's contention, the Fourth Circuit, in requiring an equivalency determination in *Blankenship*, recognized that 30 U.S.C. §921(c)(3) and the regulations at Section 718.304(a)-(c) provide for alternative means of establishing complicated pneumoconiosis. The court stated that:

> because clauses (A), (B), and (C) of § 921(c)(3) are three different ways of diagnosing complicated pneumoconiosis, in construing the requirements of each, one must perform equivalency determinations to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. In other words, the same condition that triggers the presumption by producing opacities greater than one centimeter in diameter on an x-ray should be considered "massive lesions" under the statute if diagnosed through biopsy.
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> * * *
>
> Logic commands that prongs (A) and (B) be similarly equivalent. Any other rule would lead to the irrational result that the determination of whether a miner has totally disabling pneumoconiosis could turn on the method of diagnosis rather than on the severity of his disease.

Blankenship, 177 F.3d at 243.

The court has also addressed the necessity that all relevant evidence be weighed in establishing the existence of complicated pneumoconiosis similar to the weighing of

evidence required for establishing the existence of simple pneumoconiosis pursuant to *Compton. Scarbro*, 220 F.3d at 256, 22 BLR at 2-100-101; *Blankenship*, 177 F.3d at 243-244. In addition, contrary to claimant's contention, the fact that the miner was diagnosed with progressive massive fibrosis based upon autopsy findings does not negate the requirement that the equivalency determination be made. Moreover, the Board does not have the authority to overrule the Fourth Circuit's requirement that an equivalency analysis be conducted, as the Board's decisions are subject to review by the United States Courts of Appeals.[6] *See* 33 U.S.C. §921(c), as incorporated by 30 U.S.C.

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[6] Claimant argues that the United States Court of Appeals for the Sixth Circuit held in *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999), that complicated pneumoconiosis may be established by the finding of massive lesions without any requirement of an equivalency determination. In *Gray*, the court held that a one-centimeter nodule which appeared on the miner's autopsy slides could only justify invocation of the presumption if a physician provided an opinion that such a nodule would produce an opacity of greater than one centimeter if viewed by x-ray, *or* an opinion that such a nodule constitutes a massive lesion. *Gray*, 176 F.3d at 390, 21 BLR at 2-629-630. Because the doctor's opinion at issue in *Gray* did not indicate that the one-centimeter nodule viewed by autopsy was a "massive lesion," that doctor's opinion was held to be insufficient to establish invocation of the irrebuttable presumption under 20 C.F.R. §718.304 (2000). *Id.* While the record in the instant case includes Dr. Dy's autopsy findings of massive lesions indicative of progressive massive fibrosis, Director's Exhibit 23, we need not address claimant's suggestion that this evidence is sufficient to establish the existence of complicated pneumoconiosis under Section 718.304 in light of *Gray*. The United States Court of Appeals for the Fourth Circuit, which has jurisidiction [sic] in the instant case, has mandated that the equivalency determination must be made to support a finding of invocation of the irrebuttable presumption under Section 718.304. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, ___ BLR ___ (4th Cir. 1999).

§932(a); 20 C.F.R. §802.410. Accordingly, we reject claimant's contention that it was inappropriate for the administrative law judge to undertake an analysis of whether there was an equivalency determination in considering whether claimant established the existence of complicated pneumoconiosis and the consequent invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304.

Claimant argues, in the alternative, that if the administrative law judge did apply the appropriate legal standard, he erred in finding that the testimony of Drs. Naeye and Kleinerman did not support an equivalency determination. We disagree. The administrative law judge properly found that Dr. Naeye's deposition testimony, that a twelve millimeter nodule viewed on the miner's 1990 lobectomy and two centimeter lesions viewed on the autopsy slides would "look like complicated pneumoconiosis on x-ray,"[7] Employer's Exhibit 9 at 18, "falls short of a specific finding that these lesions would be seen as at least one centimeter opacities on x-ray." 2002 Decision and Order on Remand at 2; Employer's Exhibit 9. The administrative

[7] Dr. Naeye indicated in his April 19, 1995 report that, with regard to the 1990 lobectomy, masses of carcinoma engulfed anthracotic micro and macronodules, and that, in combination, some of these masses might have been large enough on gross examination and x-ray to appear to be complicated pneumoconiosis. Employer's Exhibit 1. Dr. Naeye further indicated that the masses were not complicated pneumoconiosis, however, but rather a combination of simple pneumoconiosis and carcinoma. *Id.* Similarly, in his 1998 deposition, Dr. Naeye testified that, with regard to the autopsy slides, the two centimeter lesion found on autopsy was comprised of micro and macronodules which joined together, and which indicated a disease process different from features associated with complicated pneumoconiosis, namely, simple pneumoconiosis and carcinoma. Employer's Exhibit 9 at 10-20.

law judge also properly found Dr. Kleinerman's opinion and testimony not supportive of an equivalency finding, as Dr. Kleinerman never indicated that there were lesions viewed on autopsy that would be seen as at least one centimeter opacities on x-ray.[8] 2002 Decision and Order on Remand at 2; Employer's Exhibit 10, 12. Furthermore, the administrative law judge correctly found that the opinions of the other pathologists of record also fail to support an equivalency determination and invocation of the Section 718.304 presumption pursuant to *Blankenship*, and claimant does not contend otherwise on appeal. 2002 Decision and Order on Remand at 2. Accordingly, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a)-(c).

Finally, claimant argues that this case should be remanded to the administrative law judge for the development of additional evidence relevant to the equivalency determination requirement adopted in *Blankenship*. Claimant did not raise this argument before the administrative law judge, however, when the case was remanded previously by the Board in November 2000 and March 2002, subsequent to the court's decision in *Blankenship*, which was issued in 1999. Consequently, claimant waived her right to argue that the requirement of the Fourth Circuit in *Blankenship*, that the physicians perform an equivalency determination between the autopsy and x-ray evidence, represents a change in the law requiring remand

[8] In his deposition, Dr. Kleinerman discussed a 1.5 centimeter nodule which he identified on a 1992 x-ray and characterized as a tumor. Employer's Exhibit 10 at 67-68.

for further evidentiary development. *See Chaffin v. Peter Cave Coal Co*, BRB No. 02-0643 BLA (June 17, 2003) (published), slip op. at 3-4.

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits is affirmed.

SO ORDERED.

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Betty Jean Hall
BETTY JEAN HALL
Administrative Appeals Judge

/s/ Peter A. Gabauer, Jr.
PETER A. GABAUER, Jr.
Administrative Appeals Judge

CERTIFICATE OF SERVICE

02-0741-BLA Mildred Gollie (Widow of Joe Gollie) v. Elkay Mining Company, Director, Office of Workers' Compensation Programs (Case No. 97-BLA-0891)

I certify that the parties below were served this day.

JUL 31 2003
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/s/ [Illegible]
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Issue date: 28Jun2002

CASE NO. 1997-BLA-891

In the Matter of:

MILDRED GOLLIE (surviving spouse of JOE GOLLIE)
Claimant

v.

ELKAY MINING COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

DECISION AND ORDER ON REMAND-DENYING BENEFITS

This is the third decision and order I have issued in this case which was heard on March 24, 1999 in Charleston, West Virginia. On July 30, 1999, I issued a Decision and Order-Awarding Benefits in which I found that claimant was entitled to benefits because the evidence invoked the irrebuttable presumption in 20 C.F.R. § 718.304. The employer appealed to the Benefits Review Board which remanded the case on November 2, 2000. On

February 1, 2001, I issued a Decision and Order on Remand Awarding Benefits again finding entitlement based on invocation of the § 718.304 presumption. Employer appealed this decision to the Board which again remanded the case by Decision and Order issued on March 29, 2002. I received the file on June 19, 2002.

The Board found merit in the employer's argument that I had erred in determining whether the § 718.304 presumption had been invoked. The Board ruled that although Dr. Naeye had stated that a twelve millimeter nodule he found on a 1990 lobectomy would appear as complicated pneumoconiosis on x-ray, his statement alone was insufficient to support invocation of the § 718.304 presumption. The Board stated that the administrative law judge is required to make an equivalency determination that the twelve millimeter nodule would produce at least one opacity greater than one centimeter in diameter when viewed on x-ray, citing *Double B Mining, Inc. v. Blankenship*, 177 F. 3d 240 (4th Cir. 1999). The Board also assigned error in the failure to make an equivalency determination regarding the two centimeter lesion identified by Dr. Naeye on autopsy, comprised of coalesced anthracotic micronodules and macronodules. Further, the Board also agreed with the Director's argument that the testimony of Dr. Kleinerman did not support a finding that he had identified a specific lesion that would appear as at least a one centimeter opacity on x-ray. The Board remanded the case for consideration of whether the evidence invoked the § 718.304 presumption.

Section 718.304 provides that there is an irrebuttable presumption that, as pertinent, a miner's death was due to pneumoconiosis if (a) chest x-rays yield one or more large opacities greater than one centimeter in diameter, or (b) a

biopsy or autopsy shows massive lesions in the lungs, or (c) when diagnosed by means other than x-ray or biopsy or autopsy, would yield the same results as if diagnosis had been made by one of the first two methods. In *Blankenship*, the Court of Appeals held that because clauses (a), (b), and (c) represent three different ways of diagnosing complicated pneumoconiosis, the fact finder "must perform equivalency determinations to make certain that regardless of which technique is used, the same underlying condition triggers the irrebuttable presumption". The court held that "(w)hen the condition is diagnosed by biopsy rather than x-ray, it must . . . be determined whether the biopsy results show a condition that would produce opacities of greater than one centimeter in diameter on an x-ray". *Blankenship* at 243.

After consideration of the evidence of record in accordance with the Board's remand order, I conclude that the § 718.304 presumption has not been invoked. *See Lester v. Director, OWCP*, 993 F. 2d 1143 (4th Cir. 1993). Although Dr. Naeye testified that the twelve millimeter nodule he viewed in the 1990 lobectomy and the two centimeter lesion he saw on autopsy would look like complicated pneumoconiosis on x-ray, his opinion falls short of a specific finding that these lesions would be seen as at least one centimeter opacities on x-ray. Even assuming that Dr. Naeye made an equivalency finding, he is the only pathologist of record to do so. Dr. Kleinerman's testimony is somewhat confusing, but he was apparently not referring to a 1.5 centimeter nodule he found on the autopsy but to a similarly sized nodule found on a 1992 chest x-ray. (See EX 10, pp. 67-68). Therefore, Dr. Kleinerman's testimony does not support the requisite equivalency finding and I erred in so concluding. The opinions of the other pathologists of

record also fail to support invocation of the § 718.304 presumption under the stringent standard enunciated by the court in *Blankenship*. Although Dr. Dy, Dr. Hansbarger, Dr. Green, and Dr. Perper found nodules of coal workers' pneumoconiosis on autopsy that were greater than two centimeters in diameter, none of these pathologists stated that these lesions would produce opacities greater than one centimeter in diameter when viewed on x-ray. The other pathologists did not note lesions of this size. Therefore, a preponderance of the pathological evidence in the survivor's claim fails to invoke the § 718.304 presumption. As noted in the first decision and order on remand, neither the x-ray nor the pathological evidence from the miner's claim invokes the presumption.

Inasmuch as the evidence of record does not invoke the § 718.304 presumption, and a preponderance of the evidence does not demonstrate that the miner's pneumoconiosis contributed to or hastened his death, see 20 C.F.R. § 718.205(c), the claim will be denied.

IT IS ORDERED THAT the claim of Mildred Gollie (surviving spouse of Joe Gollie) for benefits under the Act is DENIED.

/s/ Daniel L. Leland
DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this Decision and Order was filed in the office of the district director, by filing a notice of appeal with the ***Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601***. A copy of a notice of

appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

[LOGO]

BRB No. 01-0507 BLA

MILDRED GOLLIE (Widow of JOE GOLLIE) Claimant-Respondent v. ELKAY MINING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: MAR 29 2002 DECISION and ORDER

Appeal of the Decision and Order on Remand – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice). Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (97-BLA-0891) of Administrative Law Judge Daniel L. Leland (the administrative law judge) awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] This case is before the Board for the second time. In *Gollie v. Elkay Mining Co.*, BRB No. 99-1217 BLA (Nov. 2, 2000) (unpub.), the Board vacated the administrative law

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the instant case, the Director, Office of Workers' Compensation Programs (the Director), asserts that the revised regulations will not affect the outcome of the case, and notes that the regulation at 20 C.F.R. §718.304 (2000) was not revised. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the Director regarding the impact of the challenged regulations.

judge's finding that claimant was entitled to invocation of the irrebuttable presumption of total disability and death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000) and remanded the case for reconsideration of all the relevant evidence in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *BethEnergy Mines Inc. v. Director, OWCP* [*Rowan*], 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996) (administrative law judge must provide an adequate rationale for concluding, under the facts of the case, that the autopsy prosector's [sic] opportunity to conduct a gross examination, rather than merely review slides, renders his opinion superior to the reviewing pathologists' opinions), as well as the Fourth Circuit's decisions in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999) and *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993) relevant to claimant's burden at 20 C.F.R. §718.304 (2000). The Board further instructed the administrative law judge to determine the issue of the etiology of the miner's pneumoconiosis at 20 C.F.R. §718.203(b) (2000), if reached. On remand, the administrative law judge found that the evidence was sufficient to establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000). The administrative law judge also found that claimant established that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge's finding that the evidence is sufficient to entitle claimant to the benefit of the irrebuttable presumption

provided at 20 C.F.R. §718.304 (2000) is so contrary to the record that it may be characterized as "bizarre." Employer argues that the administrative law judge's award of benefits is based on his irrational interpretation of the "equivalency determination" required by *Blankenship*. Employer argues that it was irrational for the administrative law judge to conclude that lesions which do not establish complicated pneumoconiosis on pathology would constitute complicated pneumoconiosis on x-ray where x-ray evidence is available and clearly does not show complicated pneumoconiosis in this case. Employer specifically argues that, contrary to the administrative law judge's finding, the testimony of Drs. Naeye and Kleinerman cannot be rationally interpreted as supportive of a finding of complicated pneumoconiosis because these physicians unequivocally opined that only simple pneumoconiosis was present and nothing in their speculations can support the administrative law judge's decision to award benefits. Employer thus argues that in awarding benefits, the administrative law judge substituted his opinion for that of the medical experts. Employer further argues that the administrative law judge ignored the best evidence (x-rays and pathology) and awarded benefits based on speculation of what might appear if the actual evidence did not exist. Employer seeks a reversal of the administrative law judge's finding that claimant is entitled to the benefit of the irrebuttable presumption provided at 20 C.F.R. §718.304 (2000) and, alternatively, seeks a remand of the case. Claimant responds, and seeks affirmance of the decision below. Claimant asserts that Drs. Naeye and Kleinerman testified that the lesions found on the miner's autopsy would be viewed as nodules of one centimeter or greater on x-ray, which meets the equivalency determination mandated by *Blankenship*. The Director, Office of

Workers' Compensation Programs (the Director), responds, and agrees with employer's position that the administrative law judge's decision *cannot stand. The* Director does not, however, agree with employer's argument that the opinions of Drs.. Naeye and Kleinerman necessarily foreclose a finding of complicated pneumoconiosis. The Director argues that rather, the administrative law judge's decision must be vacated because he mischaracterized the opinions of Drs. Naeye and Kleinerman and thus, did not weigh the evidence as mandated by *Scarbro*.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer challenges the administrative law judge's determination that the pathological evidence is sufficient to establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000). Considering the relevant evidence, the administrative law judge accorded greatest weight to the opinions of Drs. Naeye and Kleinerman, reviewing pathologists, based on their expertise. He found that although Drs. Naeye and Kleinerman determined that the lesion seen on the miner's autopsy did not represent complicated pneumoconiosis because it was less than two centimeters in diameter, such a finding does not foreclose invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000) under *Blankenship*. The administrative law judge further found that, under *Scarbro*, the physicians' insistence that the miner did not

have complicated pneumoconiosis did not preclude a finding of entitlement under 20 C.F.R. §718.304 (2000). In this regard, the administrative law judge stated, "Instead it must be determined if the lesion viewed on the slides would produce a 1cm opacity when viewed on x-ray." Decision and Order on Remand at 4.

Conducting an equivalency determination, the administrative law judge noted Dr. Naeye's testimony that the twelve millimeter nodule viewed on the slide of tissue taken on the miner's autopsy would look like complicated pneumoconiosis on x-ray, *see* Employer's Exhibit 9 at 20, and Dr. Kleinerman's testimony that the 1.6 centimeter lesion viewed on a lung slide would be considered progressive massive fibrosis, *see* Employer's Exhibit 10 at 68. Addressing this evidence, the administrative law judge found:

> Although neither Dr. Naeye nor Dr. Kleinerman specifically found that the lesion would be greater than one centimeter in diameter when viewed by x-ray, both physicians expressed familiarity with the interpretation and classification of chest x-rays, and their testimony is sufficiently specific to indicate that the lesion would be greater than one centimeter on x-ray. None of the other pathologists commented on whether the (sic) any nodule of pneumoconiosis in the miner's lung would appear as a large opacity on x-ray. Therefore, I conclude that the findings of Drs. Naeye and Kleinerman meet the equivalency standard set forth in *Blankenship* and that the presumption in [30 U.S.C.] §921(c)(3) has been invoked. The decedent is therefore irrebuttably presumed to have died due to pneumoconiosis.

Decision and Order on Remand at 4.

We find merit in employer's argument that the administrative law judge erred in resolving the issue of whether claimant established invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000). The administrative law judge indicated that Dr. Naeye observed a twelve millimeter nodule on the autopsy slides. Decision and Order on Remand at 4. In fact, Dr. Naeye was describing a twelve millimeter nodule he found on a 1990 lobectomy. *See* Employer's Exhibit 9 at 13, 18-20. Further, while Dr. Naeye stated that this nodule would appear as complicated pneumoconiosis on x-ray, this statement alone is not sufficient to support a finding of invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000) under *Scarbro*. Pursuant to *Scarbro* and *Blankenship*, the administrative law judge was required to make an equivalency determination, namely whether this twelve millimeter nodule seen on the miner's 1990 lobectomy would produce at least one opacity greater than one centimeter in diameter when viewed on x-ray.[2]

Further, while Dr. Naeye found a two centimeter lesion on autopsy, *see* Employer's Exhibits 1, 5, 9, 12, and testified that it would look like complicated pneumoconiosis on x-ray, *see* Employer's Exhibit 9 at 20, he testified that the lesion was "compromised of individual anthracotic

---

[2] Without specifically addressing Dr. Naeye's finding of a twelve millimeter nodule on the miner's 1990 lobectomy, the administrative law judge found:

> The pathological evidence from the miner's claims also failed to show any massive lesions which the pathologists believed would appear as one centimeter opacities on x-ray.

Decision and Order on Remand at 4.

micro and macronodules that became confluent, or joined together," and indicated a disease process different from features associated with complicated coal workers' pneumoconiosis, namely simple pneumoconiosis and cancer. Employer's Exhibit 9 at 19, 20[2]. In its Decision and Order remanding the case, the Board noted that on initial consideration the administrative law judge held that Dr. Naeye's finding of a two centimeter lesion of coalesced anthracotic macronodules is sufficient to be termed a massive lesion under the Act, *see* Board's Decision and Order at 6-7. In reconsidering Dr. Naeye's opinion on remand, the administrative law judge did not make the requisite equivalency determination, namely whether this two centimeter coalesced lesion would produce at least one opacity greater than one centimeter in diameter when viewed on x-ray, *see Scarbro, supra; Blankenship, supra,* although he was instructed to do so by the Board. *See* Board's Decision and Order at 7-8. On remand, the administrative law judge must determine whether this two centimeter lesion seen by Dr. Naeye on autopsy, comprised of coalesced anthracotic micronodules and macronodules, would produce at least one opacity greater than one centimeter in diameter when viewed on x-ray. *See Scarbro, supra; Blankenship, supra.*

We agree with the Director's argument that Dr. Kleinerman's testimony, *see* Employer's Exhibit 10 at 68,

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[2] Dr. Naeye was of the opinion that a lesion must be at least two centimeters in diameter as viewed on autopsy for a diagnosis of complicated pneumoconiosis on autopsy. Employer's Exhibit 9 at 18. The administrative law judge correctly noted that the United States Court of Appeals for the Fourth Circuit in *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, ___ BLR ___ (4th Cir. 1999) declined to impose such a rule. Decision and Order on Remand at 3.

referred to by the administrative law judge on remand, *see* Decision and Order on Remand at 4, does not appear to support a finding that the physician identified a specific lesion which would appear as at least one opacity greater than one centimeter when viewed on x-ray. We note that Dr. Kleinerman did not refer to a 1.6 centimeter lesion viewed on autopsy, as the administrative law judge found, *see* Decision and Order on Remand at 4. Rather, Dr. Kleinerman discussed a 1.5 centimeter nodule which he identified on a 1992 x-ray and had characterized as a tumor. Employer's Exhibit 10 at 67, 68. Further, although Dr. Kleinerman testified that this nodule would be considered progressive massive fibrosis using the International Labour Organization's one centimeter radiological standard, *Id.*, a diagnosis of "progressive massive fibrosis" is not a diagnosis upon which the administrative law judge could properly rely to make an equivalency determination at 20 C.F.R. §718.304 (2000). 20 C.F.R. §718.304(a)-(c) (2000); *cf.* 20 C.F.R. §410.418(b).[3] Thus, on remand, the administrative law judge must reconsider whether Dr. Kleinerman identified any lesion which would produce at least one opacity greater than one centimeter in diameter when viewed on x-ray. *Scarbro, supra*; *Blankenship, supra*.

Based on the foregoing, we vacate the administrative law judge's finding at 20 C.F.R. §718.304 (2000). On remand, the administrative law judge must reconsider all the relevant evidence and determine its sufficiency to

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[3] Like Dr. Naeye, Dr. Kleinerman also opined that lesions must be two centimeters or larger on pathology to constitute complicated pneumoconiosis. Employer's Exhibit 13 at 1. *See* discussion, *supra* at n.2.

establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000).[4]

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Betty Jean Hall
BETTY JEAN HALL
Administrative Appeals Judge

[4] In light of our decision to vacate the administrative law judge's finding of invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000), we vacate the administrative law judge's finding that claimant established that the miner's pneumoconiosis arose out of his coal mine employment. This finding, which is unchallenged on appeal, is subject to reinstatement by the administrative law judge should he again find invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 (2000).

CERTIFICATE OF SERVICE

01-0507-BLA Mildred Gollie (Widow of Joe Gollie) v. Elkay Mining Company, Director, Office of Workers' Compensation Programs (Case No. 97-BLA-0891)

I certify that the parties below were served this day.

MAR 29 2002
(DATE)

/s/ [Illegible]
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CASE NO. 1997-BLA-891

In the Matter of:

MILDRED GOLLIE (surviving
Spouse of JOE GOLLIE)
Claimant

v.

ELKAY MINING COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

DECISION AND ORDER ON REMAND-AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U. S. C. § 90 *et seq.* I presided over a formal hearing in this case in Charleston, West Virginia on March 24, 1999, and on July 30, 1999 I issued a Decision and Order-Awarding Benefits. The employer appealed to the Benefits Review Board. On November 2, 2000, the Board issued a Decision and Order remanding the case for further consideration. The Board found that I had erred in 1. mechanically crediting the

opinion of the autopsy prosecutor without comparing the quality of his opinion with the quality of the reviewing pathologists' opinions, 2. failing to make an equivalency determination as to whether the lesions in the decedent's lungs found by the pathologists would, if x-rayed, show a one centimeter opacity, 3. not considering relevant x-ray and medical evidence from the miner's claim, and 4. failing to make findings as to whether the miner's pneumoconiosis arose out of coal mine employment. The Board remanded the case for reconsideration of all relevant evidence in accordance with certain holdings by the Fourth Circuit Court of Appeals.

Evidence From the Miner's Claim

Chest x-rays from the miner's first claim filed June 30, 1973 did not reveal any large opacities, but an August 18, 1990 x-ray from the miner's July 31, 1990 claim was read as showing large opacities by Dr. Gaziano, Dr. Wiot, Dr. Spitz, Dr. Shipley, and Dr. Wheeler. (see DX 35) The latter four doctors believed that the mass in the left upper lobe may represent a carcinoma, however, and they interpreted the miner's May 14, 1991 x-ray, taken after a portion of his cancerous left lung was removed, as negative for any large opacities. Their view was shared by other radiologists who reviewed this x-ray. See Id. Later x-rays also showed only simple pneumoconiosis. The CT scans of May 7, 1993 and February 22, 1994 were read as negative for large opacities by Drs. Scott and Wheeler.

Although Dr. Khan, the surgeon who performed the left upper lobectomy, opined that the lung showed typical changes of complicated pneumoconiosis, and Dr. Klapproth found progressive massive fibrosis in the pathology

report, the majority of the pathologists who reviewed the biopsy lung slides diagnosed only simple pneumoconiosis. Dr. Kleinerman and Dr. Hansbarger declined to diagnose complicated pneumoconiosis because the lesions they observed were less than 2 centimeters in diameter. Dr. Naeye also found only simple pneumoconiosis.

Conclusions of Law

Section 411(c)(3) of the Act, 30 U. S. C. § 921(c)(3), as implemented by 20 C.F.R. § 718.304, provides:

> "There is an irrebuttable presumption that . . . a miner's death was due to pneumoconiosis . . . if the miner suffered from a chronic dust disease of the lung which:
>
> (a) when diagnosed by chest x-ray . . . yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . . , or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraph (a) or (b) of this section, would be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as described: Provided, however, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

The administrative law judge must evaluate each type of the relevant evidence referred to in § 718.304(a)-(c) and weigh this evidence together to determine if the presumption has been invoked. *See Lester v. Director, OWCP*, 993 F. 2d 1143 (4th Cir. 1993).

In *Double B Mining, Inc. v. Blankenship*, 177 F. 3d 240 (4th Cir. 1999), the Court of Appeals for the Fourth Circuit stated:

> Because clauses (A), (B), and (C) of § 921(c)(3) are three different ways of diagnosing complicated pneumoconiosis, in construing the requirements of each, one must perform equivalency determinations to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. In other words, the same condition that triggers the presumption by producing opacities greater than one centimeter in diameter on an x-ray should be considered "massive lesions" under the statute if diagnosed through biopsy. By referencing prongs (A) and (B) as guides, prong (C) of the statute requires "plainly that equivalency determinations shall be made. (Citation omitted) Logic commands that prongs (A) and (B) be similarly equivalent. Any other rule would lead to the irrational result that the determination of whether a miner has totally disabling pneumoconiosis could turn on the method of diagnosis rather than on the severity of his disease.
>
> Because prong (A) sets out an entirely objective standard, it provides the mechanism for determining equivalencies under prong (B) or prong (C). In prong (A), Congress mandated that the condition that triggers the irrebuttable presumption is one that creates, on an x-ray, at least one opacity greater than one centimeter in diameter. When that condition is diagnosed by biopsy rather than x-ray, it must therefore be determined whether the biopsy results show a condition that would produce opacities of one centimeter in diameter on x-ray. That is to say "massive lesions"

> as described in prong (B), are lesions that when x-rayed, show as opacities greater than one centimeter in diameter.

(*See Blankenship* at p. 243)

The court also declined to impose a requirement that prong (B) is satisfied only if the lesion is at least two centimeters in diameter.

Furthermore, in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F. 3d 250, 22 BLR 2-93 (4th Cir. 2000), the Court of Appeals explained that § 921(c)(3) does not refer to the triggering condition as complicated pneumoconiosis nor does it refer to a medical condition that doctors refer to as complicated pneumoconiosis, but the presumption is triggered by the application of congressionally defined criteria. In other words, § 921(c)(3) does not incorporate a purely medical definition. 22 BLR at 2-103.

In applying the criteria set forth in *Lester, Blankenship, and Scarbro* to the present case, I note that the evidence from the miner's claims does not trigger the presumption in § 718.340. The most recent chest x-ray readings clearly show only the presence of simple pneumoconiosis. The large opacity seen on some of the earlier chest x-rays apparently represented a carcinoma, as the surgical resection of the miner's left lung eliminated any radiological sign of large opacities. The pathological evidence form the miner's claims also failed to show any massive lesions which the pathologists believed would appear as one centimeter opacities on x-ray.

There are no x-rays in the survivor's claim. However the pathology reports in the survivor's claims presents a

different picture than those in the miner's claim.[1] All of the pathologists who reviewed the lung slides from the autopsy, with the possible exception of Dr. Hutchins, noted the presence of a large lesion of pneumoconiosis in the miner's lung, although only Dr. Dy, Dr. Green, and Dr. Perper diagnosed complicated pneumoconiosis or progressive massive fibrosis. I accord the greatest weight to the opinions of Dr. Naeye and Dr. Kleinerman because they are experts on the pathology of occupational lung diseases and have published numerous articles on the subject. (In contrast to my earlier decision, I do not find any justification for crediting the opinion of Dr. Dy, the autopsy prosector, over the opinions of the other pathologists. *See BethEnergy Mines, Inc. v. Director, OWCP [Rowan]* 92 F. 3d 1176 (4th Cir. 1996)). Although Dr. Naeye and Dr. Kleinerman determined that the lesion of pneumoconiosis in the miner's lung did not represent complicated pneumoconiosis because it was less than two centimeters in diameter, such a finding does not foreclose invocation of the § 921(c)(3) presumption. *See Blankenship*. Nor does their insistence that the miner did not have complicated pneumoconiosis as that term is defined medically preclude invocation of the presumption. *See Scarbro*. Instead it must be determined if the lesion viewed on the slides would produce a one centimeter opacity when viewed on x-ray. See Id.

In his deposition, Dr. Naeye testified that the 12 mm. nodule he observed on the autopsy slides would look like

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[1] The biopsy slides viewed by the pathologists in the miner's claim were from the left lung, but the large lesion from the autopsy slides was from the miner's right lung.

complicated pneumoconiosis on x-ray. (EX 9, p. 20) Dr. Kleinerman stated in his deposition that if he were using the ILO standard for x-rays, the 1.6 centimeter lesion he viewed on the lung slides would be considered progressive massive fibrosis. (EX 10, p. 68) although neither Dr. Naeye nor Dr. Kleinerman specifically found that the lesion would be greater than one centimeter in diameter when viewed by x-ray, both physicians expressed familiarity with the interpretation and classification of chest x-rays, and their testimony is sufficiently specific to indicate that the lesion would be greater than one centimeter on x-ray. None of the other pathologists commented on whether the [sic] any nodule of pneumoconiosis in the miner's lung would appear as a large opacity on x-ray. Therefore, I conclude that the findings of Drs. Naeye and Kleinerman meet the equivalency standard set forth in *Blankenship* and that the presumption in § 921(c)(3) has been invoked. The decedent is therefore irrebuttably presumed to have died due to pneumoconiosis.

Finally, as the evidence shows that the decedent was employed as a coal miner for thirty-four years and five months, claimant is entitled to the presumption in § 718.203(b) that the decedent's pneumoconiosis arose out of coal mine employment. None of the physicians has found that his pneumoconiosis had any other cause, and in fact all of them have acknowledged that his pneumoconiosis was related to his occupational exposure to coal dust. I find that the miner's pneumoconiosis arose out of his coal mine employment.

ORDER

IT IS ORDERED THAT Elkay Mining Company:

(1) pay claimant all the benefits to which she is entitled beginning as of June 1, 1996,

(2) reimburse the Black Lung Disability Trust Fund for payments it has made to claimant, and

(3) pay interest to the Black Lung Disability Trust Fund at the rate specified in § 725.608 from the date thirty days after the initial determination of liability by the district director.

/s/ Daniel L. Leland
DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order on Remand may appeal it to the Benefits Review Board within 30 days from the date of this Decision and Order on Remand, by filing a notice of appeal with the ***Benefits Review Board at P.O. Box 37601, Washington, DC 22013-7601***. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.

U.S. Department of Labor [LOGO]

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 99-1217 BLA

MILDRED F. GOLLIE (Widow of JOE GOLLIE) Claimant-Respondent v. ELKAY MINING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	**NOT-PUBLISHED** DATE ISSUED: Nov. 2, 2000

DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0891) of Administrative Law Judge Daniel L. Leland awarding benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act).[1] The administrative law judge initially found that employer stipulated to thirty years of coal mine employment and to the existence of simple pneumoconiosis. The administrative law judge then considered the evidence submitted in conjunction with the survivor's claim and found it sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b)-(c), thereby entitling claimant to the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, *see also* 20 C.F.R. §718.205(c)(3). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in excluding part of the evidence submitted by employer in response to post-hearing evidence submitted by claimant. In addition, employer contends that the administrative law judge erred in finding the evidence of

[1] Claimant is the widow of the miner, Joe Gollie, who died on June 8, 1996, Director's Exhibit 22. The miner originally filed a claim on July 31, 1990, which was ultimately denied on modification by Administrative Law Judge John C. Holmes in a Decision and Order issued on November 1, 1995, because claimant failed to establish the existence of complicated pneumoconiosis, *see* Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, or total disability due to pneumoconiosis, *see* 20 C.F.R. §718.204. Director's Exhibit 35. No further action was taken on the miner's claim and it is not at issue herein. Subsequent to the miner's death, claimant filed a survivor's claim on June 20, 1996, Director's Exhibit 1, at issue herein.

record sufficient to establish the existence of complicated pneumoconiosis. Claimant responds, urging that the Decision and Order awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in restricting the kind of evidence employer could submit in response to the post-hearing evidence submitted by claimant. Claimant responds that the Administrative Procedure Act (APA) commands the administrative law judge to exclude "irrelevant, immaterial, or unduly repetitious evidence," *see* 5 U.S.C. §556(d), as implemented by 20 C.F.R. §725.455(c), and which the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held has little or no probative value, *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

At the hearing, the administrative law judge noted that he had previously granted claimant's motion to leave the record open in order to allow the submission of post-hearing reports from two pathologists who has reviewed the autopsy evidence, Hearing Transcript at 6. There is no indication in the record that employer objected to the

submission of this evidence. The administrative law judge allowed claimant to submit this evidence[2] and allowed employer an opportunity to submit rebuttal evidence, *see* Hearing Transcript at 7-9. However, the administrative law judge limited employer's rebuttal to the submission of new reports by pathologists who had already submitted reports into the record. The administrative law judge precluded the employer's submission of reports from pulmonary specialists as they would be "less relevant," Hearing Transcript at 8.

Subsequently, the administrative law judge admitted into the record claimant's post-hearing pathology reports from Drs. Green and Perper, as well as the pathology reports submitted by employer in response from Drs. Naeye, Kleinerman, Hansbarger, Bush and Hutchins. Decision and Order at 2; *see* Claimant's Exhibits 1, 2; Employer's Exhibits 12-16. However, the administrative law judge denied employer's motion for reconsideration requesting that employer be allowed to also submit reports from four pulmonary specialists. The administrative law judge held that it was within his discretion to limit the evidence submitted in response to untimely submitted evidence and that a party does not have carte blanche to submit any amount and type of evidence which it desires.

Any evidence not submitted to the district director may be received in evidence subject to the objection of any party, if it is sent to all other parties at least twenty days before the hearing, *see* 20 C.F.R. §725.456(b)(1); *North*

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[2] Inasmuch as the administrative law judge's finding that claimant established good cause for the submission of her post-hearing evidence, *see* Hearing Transcript at 9, is unchallenged on appeal, it is affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

American Coal Co. v. Miller, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). Pursuant to 20 C.F.R. §725.456(b)(2), the administrative law judge may admit, at his discretion, documentary evidence not submitted to the district director and not exchanged by the parties within twenty days before a hearing, if the parties waive the requirement or if a showing of good cause is made as to why such evidence was not exchanged, *see* 20 C.F.R. §725.456(b)(2); *Miller, supra; Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). If the administrative law judge admits "late" evidence into the record, 20 C.F.R. §725.456(b)(3) requires that the record be left open for at least thirty days after the hearing to permit the parties the opportunity to respond to such evidence, *see* 20 C.F.R. §725.456(b)(3); *Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984). The Fourth Circuit has held, however, that the APA, *see* 5 U.S.C. §556(d), as implemented by 20 C.F.R. §725.455(c), makes clear that a party is only entitled to such rebuttal "as may be required for a full and true disclosure of the facts," *see Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991); *see also* 20 C.F.R. §725.456(b)(3).

Contrary to employer's contention that the administrative law judge did not provide any basis for limiting employer's rebuttal evidence, the administrative law judge determined that opinions of pulmonologists would be "less relevant" than pathologists' opinions. *See* Hearing Transcript at 8; *Underwood, supra.* Moreover, in deciding the case on the merits, the administrative law judge ultimately relied on the opinions of the pathologists, allowing employer to submit five pathologists' opinions in response to the opinions of the two pathologists submitted by

claimant. Thus, employer's right to establish a full and true disclosure of the facts on rebuttal was satisfied, *see Henderson, supra.* Consequently, we affirm the administrative law judge's exclusion of additional reports from pulmonologists, proffered by employer in response to claimant's post-hearing evidence, as a proper exercise of his discretion.

Turning to the merits, employer contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304. Before determining whether invocation of the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304(a)-(c), has been established, the administrative law judge shall first determine whether the evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis and then all relevant evidence pursuant to Section 718.304(a)-(c) must be considered and weighed together, *see Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).[3] However, the irrebuttable presumption

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[3] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that . . . a miner's death was due to pneumoconiosis . . . if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray . . . yields one or more large opacities (greater than 1 centimeter in diameter) . . . ; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

(Continued on following page)

under Section 411(c)(3) of the Act does not refer to the triggering condition for invocation of the presumption as "complicated pneumoconiosis," nor incorporate a purely medical definition of "complicated pneumoconiosis," but rather the presumption is triggered by the application of congressionally defined criteria, *see Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, BLR (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999). Thus, the Fourth Circuit has held that the irrebuttable presumption at Section 411(c)(3) of the Act provides three different ways of establishing the triggering condition and requires that the administrative law judge make an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the presumption, *i.e.*, if a diagnosis is by biopsy or autopsy, a miner must have "massive lesions" which are defined as lesions which would, if x-rayed, show as opacities greater than one centimeter in diameter, *see Blankenship, supra.*

The administrative law judge only considered the relevant evidence submitted in conjunction with the survivor's claim. The autopsy report from Dr. Dy diagnosed an area of massive progressive fibrosis of complicated anthracotic pneumoconiosis measuring 5.5 by 5 by 3

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: Provided, however, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

centimeters on both gross and microscopic examination. Director's Exhibit 23. Drs. Green and Perper both board-certified pathologists, reviewed the autopsy evidence and also diagnosed complicated pneumoconiosis and a lesion of progressive massive fibrosis based on a lesion greater than two centimeters. Claimant's Exhibits 1, 2. Employer submitted opinions from Drs. Naeye, Hansbarger, Kleinerman, Hutchins and Bush, all of whom were board-certified pathologists, who reviewed the autopsy evidence. Dr. Naeye found a two centimeter lesion, Employer's Exhibits 1, 5, 9, 12, which he noted would look like complicated pneumoconiosis on gross examination and on an-x-ray [sic], Employer's Exhibit 9 at 20. However, Dr. Naeye opined that because it was only coalesced individual anthracotic nodules and was not two centimeters in all dimensions, it was not a lesion of progressive massive fibrosis and/or complicated pneumoconiosis. Dr. Kleinerman found a 1.6 centimeter mass which he described as a confluence of lesions of silicosis and tumor, but opined that it was not complicated pneumoconiosis, which he stated must be at least two centimeters, Employer's Exhibits 2, 10, 13. Dr. Kleinerman also noted that the lesion would look like progressive massive fibrosis on x-ray, Employer's Exhibit 10 at 68. Dr. Hansbarger found masses up to 1.8 centimeters and nodules greater than two centimeters, but noted that they were adjacent to and/or in combination with tumor and, therefore, were not progressive massive fibrosis or complicated pneumoconiosis, Employer's Exhibits 1, 14. Dr. Bush diagnosed simple coal workers' pneumoconiosis, but opined that the description of large lesions of pulmonary massive fibrosis on gross examination was not confirmed on microscopic examination, which he stated revealed that they were composed mostly of adenocarcinoma, Employer's Exhibits 4, 15. Finally, Dr. Hutchins found that

the lesions which met the size criteria for pulmonary massive fibrosis were actually a fusion or mixture of lesions of coal workers' pneumoconiosis and carcinoma, Employer's Exhibits 3, 16.[4]

The administrative law judge initially noted that there were no x-ray readings indicating large opacities and gave more weight to the opinions of the pathologists over the opinions of the pulmonologists, who had not reviewed the autopsy slides, Decision and Order at 6-7. The administrative law judge found that although the pathologists, whose opinions were submitted by employer, declined to diagnose complicated pneumoconiosis in part because the lesions found were not two centimeters in diameter, there was no such requirement in the Act or regulations. Rather, the administrative law judge noted that a diagnosis of massive lesions has been found by the Fourth Circuit to be sufficient to invoke the Section 718.304 presumption, even when less than two centimeters in diameter. *See Blankenship, supra.*[5] Further, the

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[4] In addition, employer submitted opinions from Drs. Fino, Employer's Exhibit 7, Stewart, Employer's Exhibit 7, Zaldivar, Employer's Exhibit 8, and Loudan, Employer's Exhibits 8, 11, who are pulmonologists, as well as the opinion of Dr. Chillag, Employer's Exhibit 6. All of these physicians reviewed the evidence of record and found that the miner had simple pneumoconiosis which played no role in his death. Drs. Fino and Loudan also concluded that the miner did not have complicated pneumoconiosis.

[5] In *Blankenship*, as the administrative law judge held, the Fourth Circuit declined to impose a rule that complicated pneumoconiosis can only be diagnosed by a biopsy or autopsy if it reveals evidence of a lesion at least two centimeters in diameter in order establish "massive lesions," which would, if x-rayed, show as opacities greater than one centimeter in diameter, *see Blankenship, supra.* The Fourth Circuit also held that the irrebuttable presumption at Section 411(c)(3) of the Act

(Continued on following page)

administrative law judge found no authority for the proposition that the effect of the miner's adenocarcinoma on the lungs rules out a diagnosis of massive lesions, specifically holding that Dr. Naeye's finding of a two centimeter lesion of coalesced anthracotic macronodules is sufficient to be termed a massive lesion under the Act, *see* 20 C.F.R. §718.304(b). The administrative law judge also held that Dr. Naeye's opinion that the lesion would look like complicated pneumoconiosis on x-ray was sufficient to satisfy the equivalency criteria, *i.e.*, that the lesion, if x-rayed, would show as opacities greater than one centimeter in diameter, *see Blankenship, supra.* Ultimately, the administrative law judge gave greatest weight to the opinion of Dr. Dy, the autopsy prosector, as he was the only pathologist who had conducted a gross examination of the miner's lungs and had, therefore, found the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b)-(c), thereby entitling claimant to the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, *see also* 20 C.F.R. §718.205(c)(3).

Employer contends that the administrative law judge erred in failing to weigh all of the relevant evidence of record, *i.e.*, x-ray and medical opinions from the miner's claim, and in mechanically crediting Dr. Dy's opinion because he was the autopsy prosector without considering the qualifications of reviewing physicians. As employer contends, the Fourth Circuit has held that an administrative law judge must consider the quality of the autopsy

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does not incorporate a purely medical definition of "complicated pneumoconiosis," *see Scarbro, supra.*

prosector's opinion and the quality of the reviewing pathologists' contrary opinions and provide an adequate rationale for concluding, under the facts of the case, that the autopsy prosector's opportunity to conduct a gross examination, rather than merely review slides, renders his opinion superior to the reviewing pathologists' opinions, *see BethEnergy Mines, Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996)(Hall, J., dissenting).

In addition, although the administrative law judge found that Dr. Naeye's opinion, that the lesion he described would look like complicated pneumoconiosis on x-ray, was sufficient to satisfy the equivalency criteria, *i.e.*, that the lesion, if x-rayed, would show as opacities greater than one centimeter in diameter, Dr. Naeye did not specifically find that the lesion would show as greater than one centimeter in diameter on an x-ray, *see Blankenship, supra*.[6] Moreover, the administrative law judge did not make an equivalency determination as to whether the findings of Dr. Dy of "massive progressive fibrosis" and "complicated anthracotic pneumoconiosis," Director's Exhibit 23, and the findings of Drs. Green and Perper of "complicated pneumoconiosis" and a "lesion" of "progressive massive fibrosis," Claimant's Exhibits 1-2, would, if x-rayed, show as a one centimeter opacity, *see Blankenship, supra*.

Finally, the administrative law judge did not consider relevant x-ray and medical opinion evidence from the

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[6] Similarly, Dr. Kleinerman also noted that the lesion would look like progressive massive fibrosis on x-ray, *see* Employer's Exhibit 10 at 68; Director's Exhibit 35.

miner's claim, *see* Director's Exhibit 35, which indicated the existence of a large opacity, *see Lester, supra.* While the evidence in the miner's claim provides conflicting opinions regarding whether the large opacity represented complicated pneumoconiosis or cancer, the Fourth Circuit has held that the irrebuttable presumption at Section 411(c)(3) of the Act is triggered not by the medical definition of "complicated pneumoconiosis," but by application of congressionally defined criteria, *see Scarbro, supra.* Thus, contrary to employer's contentions, even the opinions submitted by employer from Drs. Naeye and Kleinerman, as well as Drs. Hansbarger, Hutchins, Bush and the relevant x-ray and medical opinion evidence from the deceased miner's claim, diagnosing the existence of lesions and opacities, all could potentially be sufficient to trigger the irrebuttable presumption at Section 411(c)(3) of the Act if the administrative law judge determines that their findings would, if x-rayed, show as a one centimeter opacity, *see Blankenship, supra.*

Consequently, we vacate the administrative law judge's finding and remand the case for the administrative law judge to reconsider all the relevant evidence of record in accordance with the holdings enunciated by the Fourth Circuit in *Rowan, supra, Lester, supra, Blankenship, supra* and *Scarbro, supra.* The administrative law judge, within his discretion, may reopen the record on remand if he finds that further development of the evidence is warranted, *see* 20 C.F.R. §725.456(e); *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(Brown, J., concurring; Smith, J., dissenting); *Lynn v. Island Creek Coal Co.*, 11 BLR 1-146 (1989); *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). Finally, even if claimant establishes the irrebuttable presumption

under Section 411(c)(3) of the Act in this survivor's claim, she must still establish, by director proof or presumption, that the miner's pneumoconiosis arose out of his coal mine employment, *see* 20 C.F.R. §718.203. Thus, inasmuch as the administrative law judge did not make any findings pursuant to Section 718.203, the administrative law judge should, if reached, consider on remand whether pneumoconiosis arising out of coal mine employment is established pursuant to Section 718.203.

Accordingly, the Decision and Order awarding benefits by the administrative law judge is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

/s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals
Judge

/s/ [Illegible]
ROY P. SMITH
Administrative Appeals
Judge

/s/ Malcolm D. Nelson
MALCOLM D. NELSON,
Acting Administrative
Appeals Judge

CERTIFICATE OF SERVICE

99-1217-BLA Mildred Gollie (widow of Joe Gollie) v. Elkay Mining Company, Director, Office of Workers' Compensation Programs (Case No. 97-BLA-0891)

I certify that the parties below were served this day.

Nov. 2, 2000
(DATE)

/s/ Belinda E. Jensen/Sr
Thomas O. Shepherd, Jr.
Clerk of the Board

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In the Matter of:

MILDRED F. GOLLIE (surviving spouse of JOE GOLLIE)

Claimant

v.

ELKAY MINING COMPANY

Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party in Interest

DATE ISSUED:
JUL. 30, 1999

Case No.
1997-BLA-891

APPEARANCES:

Leonard Stayton, Esq
For the Claimant

Mary Rich Maloy, Esq.
For the Employer

Before: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Charleston, West Virginia, on March 24, 1999, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-36 and employer's exhibits (EX) 1-11 were admitted into evidence.[1] The record was left open for claimant to submit pathologists' reports and for employer to submit an appropriate response. Claimant has submitted claimant's exhibit (CX) 1 –the March 19, 1999 report of Dr. Francis Green, and CX 2 – the May 23, 1999 report of Dr. Joshua Perper. These reports are made part of the record. In response, employer has submitted EX 12 – the June 8, 1999 report of Dr. Richard L. Naeye, EX 13 – the June 14, 1999 report of Dr. Jerome Kleinerman, EX 14 – the June

[1] EX 8 and EX 11 are identical.

15, 1999 report of Dr. Echols Hansbarger, EX 15 – the June 16, 1999 report of Dr. Stephen Bush, and EX 16 – the June 22, 1999 report of Dr. Grover Hutchins. These reports are also made part of the record. Employer also submitted as proposed EX 17-20 the reports of four pulmonary specialists, and moves for reconsideration of the ruling of the undersigned that its rebuttal evidence be limited to the reports of pathologists as claimant's post hearing evidence consisted solely of pathologists' reports. (TR 8) The motion for reconsideration is denied. It is within the discretion of the administrative law judge to limit the evidence submitted in response to untimely submitted evidence. A party does not have carte blanche to submit any amount and type of evidence which it desires. (EX 17-20 are not admitted)

ISSUES

The employer stipulated to thirty years of coal mine employment and the existence of simple pneumoconiosis. It contests the existence of complicated pneumoconiosis and whether pneumoconiosis caused the miner's death.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History and Background

Mildred F. Gollie is the widow of Joe Gollie (decedent or miner), who was born on April 10, 1924 and died on June 8, 1996. (DX 1) The decedent's employment records verify thirty-four years and five months of coal mine employment. (See DX 3, 6, 7, 12, 13, 14, 16, 17) Claimant filed a claim for survivor's benefits on June 20, 1996 and was awarded benefits by the district director on November 1, 1996 and January 21, 1997. (DX 1, 26, 32) The case was

referred to the Office of Administrative Law Judges on March 14, 1997. (DX 36) Claimant testified that the decedent had breathing problems and was being treated for lung cancer at the time of his death. (TR 13) He was on oxygen for a few months before he died. (TR 14) The decedent smoked approximately one half pack of cigarettes a day until 1984 when he had open heart surgery. (TR 18-19)

Medical Evidence

The miner's death certificate gave the cause of death as cardiac respiratory arrest due to lung cancer and arteriosclerotic heart disease. (DX 22)

An autopsy was performed by Dr. Antonio Dy. (DX 23) In his gross description of the lungs, Dr. Dy noted moderate to marked macular anthracotic pneumoconiosis with palpable micronodules that were less than 3 mm in diameter and an anthracotic deposit of massive progressive fibrosis measuring 5.5 x 5.0 x 3.0 cm. In his microscopic examination he also observed malignant tumor cells, massive progressive fibrosis, and interstitial fibrosis. Dr. Dy's final anatomic diagnosis was: 1) early acute bronchopneumonia; 2) massive progressive fibrosis (advanced or complicated anthracotic pneumoconiosis); 3) adenocarcinoma of the lungs with metastases to surrounding lymph nodes; 4) visceral pleural fibrosis with circular anthracosis, 5) extensive confluent nodular hyalinizations, and 6) status post sternectomy and wiring of the sternum.

Dr. M.I. Ranavaya, a Department of Labor consultant who is board certified in occupational medicine, reviewed the medical evidence and concluded that the decedent had coal workers' pneumoconiosis which was a substantially

contributing factor in his death, and that he also had complicated pneumoconiosis. (DX 24)

In an April 19, 1995 report, Dr. Richard L. Naeye, a board certified pathologist, provided his views after reviewing the evidence and examining slides from the decedent's 1990 lobectomy. (EX 1) Dr. Naeye noted anthracotic macronodules up to 1.2 cm in diameter and focal and centrilobular emphysema. He determined that the miner had severe simple coal workers' pneumoconiosis which was too mild to have hastened his death.

Dr. Echols Hansbarger, a board certified pathologist, reviewed the medical evidence and examined the autopsy slides. (EX 1) Dr. Hansbarger determined that the decedent died as a result of severe atherosclerotic heart disease with adenocarcinoma of the lung, that he had simple coal workers' pneumoconiosis but not complicated pneumoconiosis or progressive massive fibrosis, and that the decedent's pneumoconiosis did not contribute to or hasten his death. Dr. Hansbarger asserted that progressive massive fibrosis can not be diagnosed unless the nodules are greater than 2 cm in diameter. He stated that although some of the nodules in the decedent's lungs are larger than 2 cm, they were adjacent to the tumor, and the fibrosing effect of carcinoma of the lung on the lung parenchyma rules out a diagnosis of progressive massive fibrosis. In his examination of the autopsy slides, Dr. Hansbarger observed coal macules up to 0.5 cm in greatest dimension, masses up to 1.8 cm in greatest dimension, and combinations of anthracotic pigment and adjacent tumor larger than 2 cm. He diagnosed adenocarcinoma of the lung, acute bronchopneumonia, centrilobular emphysema, severe nodular coal workers' pneumoconiosis, and anthracosilicosis of the bronchial lymph nodes.

The evidence includes records of the decedent's treatment at the Charleston Area Medical Center. (EX 1)

The decedent's autopsy, slides and medical records were reviewed by Dr. Jerome Kleinerman, a board certified pathologist. (EX 2) Dr. Kleinerman determined that the decedent's lungs showed lesions of simple coal workers' pneumoconiosis and simple nodular silicosis but not complicated pneumoconiosis. He also noted adenocarcinoma and interstitial fibrosis in the lungs. Dr. Kleinerman maintained that the decedent's pneumoconiosis and silicosis did not contribute to or hasten his death.

Dr. Grover M. Hutchins, who is board certified in anatomic pathology, examined the autopsy slides and relevant medical evidence. In a November 22, 1997 report (EX 3), Dr. Hutchins stated that the miner's lungs contained micronodules and macronodules of coal workers' pneumoconiosis, but he found no lesions of progressive massive fibrosis. Dr. Hutchins also observed silicotic nodules, metastatic lesions of lung cancer, and centrilobular emphysema in the miner's lungs. Dr. Hutchins concluded that the decedent had severe simple coal workers' pneumoconiosis which was not severe enough to have contributed to his death, which was caused by carcinoma of the lung. He attributed both the decedent's centrilobular emphysema and lung cancer to his cigarette smoking.

The medical records and histologic slides were reviewed by Dr. Stephen Bush, a board certified pathologist. (EX 4) Dr. Bush determined that the miner's lungs indicated mild to moderate coal workers' pneumoconiosis manifested by micronodules measuring up to 0.5 cm as well as larger lesions of anthracosilicosis. He did not believe that the decedent's pneumoconiosis and anthracosilicosis

contributed to or hastened his death. Dr. Bush stated that the description of lesions consistent with progressive massive fibrosis noted in the gross autopsy examination was not confirmed by microscopic examination which showed these lesions to be composed mostly of masses of adenocarcinoma.

Dr. Naeye submitted a report dated November 29, 1997 after reviewing additional information and the autopsy slides. (EX 5) In the slides, Dr. Naeye noted a lesion of black pigment measuring 2 x 1 cm, but since it was less than 2 cm in some dimensions, he concluded that it was too small to be classified as progressive massive fibrosis. He stated that the decedent had moderately severe simple coal workers' pneumoconiosis which did not contribute to his death which Dr. Naeye attributed to carcinoma originating in the left lung. Dr. Naeye found that pneumoconiosis did not hasten the miner's death.

The medical records were reviewed by Dr. Shawn Chillag, Dr. Gregory Fino, Dr. Bruce Stewart, Dr. George Zaldivar, and Dr. Robert Loudon, who are all pulmonary specialists except for Dr. Chillag. (EX 6, 7, 8) All these physicians agreed that the decedent had simple pneumoconiosis which played no role in his death. In addition, Dr. Fino and Dr. Loudon concluded that the decedent did not have complicated pneumoconiosis.

Dr. Naeye was deposed on May 11, 1998. (EX 9) He is a professor of pathology at Pennsylvania State University College of Medicine and was a member of the committee that formulated the pathological standards for assessment of coal workers' pneumoconiosis. Id at 4, 6-7. However, it has been fifteen years since he was actively engaged in research on lung diseases. Id at 32-33. Dr. Naeye indicated

that there were masses of carcinoma that were engulfing the anthracotic micro and macronodules in the decedent's lungs. In combination, some of the masses exceeded 2 cm in diameter but they did not represent complicated pneumoconiosis because none of the lesions reached 2 cm in all dimensions and because they lacked the histological characteristics of complicated pneumoconiosis. Id at 17-19. Specifically, Dr. Naeye testified that although the lesion that was 2 cm in diameter in some dimensions was comprised of confluent anthracotic micro and macronodules, it was not complicated pneumoconiosis because it lacked a narcotic center and a substantial number of macrophages. Id at 19-20. Dr. Naeye acknowledged that the 1.2 cm lesion he noted from the lobectomy would look like complicated pneumoconiosis if viewed on x-ray. Id at 20. Dr. Naeye further testified that the 2 x 1 cm mass seen on the autopsy slides was not complicated pneumoconiosis because it was comprised of adjacent micronodules and macronodules with normal tissue around some of the nodules. Id at 23.

Dr. Kleinerman was deposed on May 8, 1998. (EX 10) Dr. Kleinerman stated that the 1.6 mass he noted in the right upper lobe was too small to be classified as progressive massive fibrosis because that diagnosis requires a lesion with a 2 cm diameter. Id at 24, 34-35.

The medical records and autopsy slides were reviewed by Dr. Francis Green, a board certified anatomic pathologist. (CX 1) Dr. Green concluded that the miner had severe pneumoconiosis characterized by macules, micronodules, and macronodules. He also noted a lesion of progressive massive fibrosis in the lungs that was slightly larger than 2 cm. Dr. Green also diagnosed cor pulmonale and metastatic adenocarcinoma. Dr. Green stated that the decedent

died due to complications of lung cancer in combination with pneumoconiosis.

Dr. Joshua Perper, a board certified pathologist, reviewed the autopsy slides and medical records. In his report dated May 23, 1999 (CX 1), Dr. Perper stated that he observed multiple macules and fibro-anthracotic micronodules, adenocarcinoma, centrilobular emphysema, and bronchopneumonia in the lung slides as well as an area of fibroanthracosis measuring 2.1 x 1.0 cm which he felt represented progressive massive fibrosis. Dr. Perper diagnosed both simple and complicated pneumoconiosis resulting from coal dust exposure, and he also attributed the decedent's adenocarcinoma and centrilobular emphysema to his coal mine employment. He listed the causes of death as coal workers' pneumoconiosis with progressive massive fibrosis, chronic obstructive pulmonary disease with centrilobular emphysema, ischemic heart disease, and bronchopneumonia. Dr. Perper found that pneumoconiosis contributed substantially to the miner's death by causing hypoxemia.

Drs. Naeye, Kleinerman, Hansbarger, Bush, and Hutchins submitted reports rebutting the findings of Drs. Green and Perper. (EX 12-16) Dr. Naeye reiterated his conclusion that the decedent did not have progressive massive fibrosis, and he took issue with the findings of Dr. Green and Dr. Perper that centrilobular emphysema and lung cancer can be caused by coal dust inhalation. Drs. Kleinerman, Hansbarger, Bush, and Hutchins also took issue with the findings of Dr. Green and Dr. Perper. They repeated their conclusions that the decedent did not have complicated pneumoconiosis and that pneumoconiosis did not play any role in his death.

Conclusions of Law

Death will be considered due to pneumoconiosis where the medical evidence establishes that the miner's death was due to pneumoconiosis, or where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or where the presumption in § 718.304 is applicable. § 718.205(c). Section 718.304 provides:

> There is an irrebuttable presumption that . . . a miner's death was due to pneumoconiosis . . . if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest x-ray . . . yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . . ; or
>
> (b) When diagnosed by biopsy or autopsy yields massive lesions in the lung;
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) . . . would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) . . . , had diagnosis been made as therein described. . . .

All relevant evidence must be considered in determining whether the § 718.304 presumption has been invoked.

Although there are no x-ray readings in the record indicating large opacities, autopsy evidence is considered the gold standard for diagnosing the existence and severity of pneumoconiosis. I give the pathologists' reports more weight than the reports of the nonpathologists who did not

review the autopsy slides. Dr. Dy, the autopsy prosector, diagnosed progressive massive fibrosis based on his observation of a 5.5 x 5.0 x 3.0 cm. anthracotic lesion in his gross examination, and he confirmed this diagnosis in his microscopic examination. Dr. Green and Dr. Perper also diagnosed progressive massive fibrosis after reviewing the autopsy slides. Drs. Hansbarger, Naeye, Kleinerman, and Bush noted large lesions in the miner's lungs in their review of the lung slides.[2] Although the employer's pathologists declined to diagnose complicated pneumoconiosis because the lesions they found were less than 2 cm in diameter, a diagnosis of massive lesions in the lungs is sufficient to invoke the § 718.304 presumption even if the lesions are less than 2 cm in diameter. See *Double B. Mining, Inc. v. Blankenship*, 177 F. 3d 240 (4th Cir. 1999), *Lohr v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984). See also *Gruller v. Bethenergy Mines Inc.* 16 BLR 1-3 (1991), where the Benefits Review Board held that the autopsy prosector's report of "lesions that are large, firm, and black" which "vary in size up to 1.0 cm" adequately described the condition comprehended by the term "massive lesions". There is no requirement in the Act or the regulations that the lesions must be 2 cm in diameter. Nor is there any authority that the fibrosing effect of the miner's adenocarcinoma on the lung or the presence of normal tissue between the macronodules rules out the

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[2] Dr. Hansbarger found a mass ranging up to 1.8 cm in greatest dimension, Dr. Naeye noted a mass of fibrous tissue with black pigment that was 2 x 1 cm in greatest dimension, Dr. Kleinerman observed a pneumoconiosis nodule that was 1.6 cm in diameter, and Dr. Bush found "larger lesions of anthracoslilicosis" greater than 0.5 cm. Dr. Hutchins stated only that he found no lesions of progressive massive fibrosis.

diagnosis of massive lesions. Dr. Naeye's testimony that the lesion in the decedent's lungs did not represent complicated pneumoconiosis because it lacked the appropriate histological characteristics does not preclude invocation of the irrebuttable presumption as he acknowledged that the nearly 2 cm lesion in the decedent's lungs was composed of confluent anthracotic nodules, which qualifies it as a massive lesion under the Act. I give the greatest weight to the opinion of Dr. Dy because he is the only pathologist who grossly examined the decedent's lungs. After considering all the evidence, I conclude that there were massive lesions in the miner's lungs.

Moreover, Dr. Naeye's determination that the 1.2 cm nodule from the lobectomy would be seen as a 1 cm opacity on the x-ray meets the equivalency criteria at § 718.304(c). *Clites v. Jones & Laughlin Steel Corp.*, 663 F. 2d 14, 16 (3d Cir. 1980). See also *Double B Mining, supra.* After weighing all the relevant evidence, I find that § 718.304 irrebuttable presumption has been invoked at (b) and (c). It is therefore presumed that the miner's death was due to pneumoconiosis.

As the miner's death was due to pneumoconiosis, claimant is entitled to benefits. Benefits will be awarded as of June 1, 1996, the first day of the month in which complicated pneumoconiosis was first diagnosed in the autopsy report. Claimant's counsel has thirty days to file a fully supported fee application and his attention is directed to §§ 725.365 and 725.366. Employer's counsel has ten days to respond with objections.

SERVICE SHEET

Case Name	MILDRED F. GOLLIE (surviving spouse of JOE GOLLIE)
Case No.:	1997-BLA-891
Title of Document:	DECISION AND ORDER – AWARDING BENEFITS

I certify that on Jul. 30, 1999 a copy of the above-entitled document was mailed to the following parties:

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No. 04-39

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In The
Supreme Court of the United States

MILDRED GOLLIE,

Petitioner,

v.

ELKAY MINING COMPANY, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Title 30 U.S.C. § 921(c)(3) of the Black Lung Benefits Act provides an irrebuttable presumption that a miner's death is contributed to by coal workers' pneumoconiosis if a preponderance of the medical evidence establishes complicated pneumoconiosis or progressive massive fibrosis. The condition which triggers the irrebuttable presumption is established by: chest x-rays classified as revealing opacities greater than one centimeter (§ 921(c)(3)(A)); autopsy or biopsy evidence of massive lesions in the lungs (§ 921(c)(3)(B)); or a diagnosis by other means such as a CT scan that establishes a condition which could reasonably be expected to yield results described by x-ray, autopsy, or biopsy (§ 921(c)(3)(C)).

The Petition raises the following issue:

> Are the decisions of the United States Court of Appeals for the Fourth and Sixth Circuits consistent regarding how an administrative law judge must weigh the different types of medical evidence under 30 U.S.C. § 921(c)(3) when determining the existence of complicated pneumoconiosis?

PARTIES TO THE PROCEEDING

Petitioner

Mildred Gollie is the surviving spouse of Joseph Gollie, a former coal miner, who filed for federal black lung survivor's benefits pursuant to the provisions of the Black Lung Benefits Act. 30 U.S.C. § 901 (2001).

Respondent

Elkay Mining Company is the company which last employed Joseph Gollie in coal mine employment.

Party-In-Interest

The Director of the United States Department of Labor Office of Workers' Compensation Programs is designated by regulation as a party in all claims litigated under the Black Lung Benefits Act. 20 C.F.R. § 725.360(a)(5) (2001).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Elkay Mining Company is a wholly owned subsidiary of Thames Development, Ltd. which is a wholly owned subsidiary of Pittston Coal Company. Pittston Coal Company is a wholly owned subsidiary of Pittston Minerals Group, Inc. which is a wholly owned subsidiary of The Brink's Company. The Brink's Company is a publicly traded company on the New York Stock Exchange.

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BASIS FOR JURISDICTION

The United States Court of Appeals for the Fourth Circuit has jurisdiction over an appeal from a final order of the Benefits Review Board pursuant to Section 21(c) of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. § 921(c), as incorporated by Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a). The United States Court of Appeals for the Fourth Circuit rendered the decision at issue on April 8, 2004. The parties did not file any motions for rehearing. Petitioner timely filed her Petition for Writ of Certiorari within ninety days of that denial. *See* 28 U.S.C. § 2101(c); SUP. CT. R. 13.3. Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

30 U.S.C. § 921(c)(3):

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due

> to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be.

STATEMENT OF THE CASE

This case involves a claim for survivor's benefits filed under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. §§ 901-945. (Petitioner's App. 55) Mildred Gollie, the surviving spouse of coal miner Joseph Gollie, filed her claim for benefits on June 20, 1996. (Petitioner's App. 56) Following a formal hearing, an Administrative Law Judge ("ALJ") issued a Decision and Order awarding benefits on July 30, 1999. (Petitioner's App. 54) The ALJ found the miner had complicated coal workers' pneumoconiosis[1] based on the opinion of the autopsy prosector, although he found no x-ray interpretations in the record revealing large opacities. (Petitioner's App. 63-65)

Elkay Mining Company appealed to the Benefits Review Board ("Board") which issued a Decision and Order on November 2, 2000, vacating the award of benefits and remanding the claim for further consideration. (Petitioner's App. 40) The Board found the ALJ erred by mechanically crediting the autopsy prosector's opinion. (Petitioner's App. 49-50) The Board remanded the case for reconsideration of all relevant evidence regarding the

[1] In the Black Lung Benefits Act, Congress defined coal workers' pneumoconiosis as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

existence of complicated coal workers' pneumoconiosis. The Board instructed the ALJ on remand to weigh the evidence regarding complicated pneumoconiosis in accordance with the decisions of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000) and *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999) which require an ALJ to determine whether the CT scan, biopsy, or autopsy findings would appear as an opacity greater than one centimeter when viewed on a chest x-ray.[2] (Petitioner's App. 51)

The ALJ issued a Decision and Order awarding benefits on remand dated February 1, 2001. (Petitioner's App. 32) He concluded the x-ray evidence fails to establish the presence of complicated pneumoconiosis. The ALJ found all of the pathologists noted the presence of a large lesion on the autopsy slides in the miner's right lung. The pathologists disagreed, however, regarding whether that large lesion constituted complicated coal workers' pneumoconiosis or progressive massive fibrosis. He found both Dr. Richard Naeye and Dr. Jerome Kleinerman testified the nodule observed on the autopsy slides would look like complicated coal workers' pneumoconiosis upon an x-ray. He found their testimony met the equivalency standard set forth in the decisions of the United States Court of Appeals for the Fourth Circuit. Accordingly, he awarded benefits. (Petitioner's App. 38)

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[2] Joseph Gollie's last coal mine employment occurred in the states of West Virginia and Virginia, and thus the applicable law is that of the United States Court of Appeals for the Fourth Circuit. *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989).

Elkay Mining Company appealed to the Board arguing the ALJ's finding of complicated pneumoconiosis was based on an incorrect application of the equivalency determination. The Director participated in the appeal and agreed with Elkay Mining Company that the ALJ's decision to award benefits could not stand because the ALJ mischaracterized the testimony of Drs. Naeye and Kleinerman and did not weigh the evidence according to the applicable law. (Petitioner's App. 24-25)

On March 29, 2002, the Board issued a Decision and Order again vacating the award of benefits. (Petitioner's App. 21) The Board agreed the ALJ mischaracterized the testimony of Dr. Kleinerman and ordered him to reconsider Dr. Kleinerman's assessment on remand. (Petitioner's App. 28-29) The Board also held the ALJ did not make the requisite equivalency determination regarding Dr. Naeye's assessment of the autopsy evidence and ordered him to reconsider Dr. Naeye's opinion on remand. (Petitioner's App. 27-28)

The ALJ issued a Decision and Order on remand denying benefits on June 28, 2002. (Petitioner's App. 16) He found upon reconsideration of the testimony of Drs. Naeye and Kleinerman that neither physician specifically stated the opacities found during the biopsy or autopsy would be equivalent to an opacity measuring more than one centimeter on an x-ray. Accordingly, he found their assessments insufficient to support a finding of complicated coal workers' pneumoconiosis pursuant to 30 U.S.C. § 921(c)(3). He also found all of the other pathologists failed to indicate whether the lesions found at autopsy would produce an opacity greater than one centimeter in diameter when viewed on x-ray. He concluded the

evidence is insufficient to establish complicated pneumoconiosis, and therefore, denied benefits. (Petitioner's App. 18-19)

Mrs. Gollie appealed to the Benefits Review Board. The Board issued a Decision and Order affirming the denial of benefits on July 31, 2003. (Petitioner's App. 4) Mrs. Gollie then filed a Petition for Review with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the denial of benefits by decision dated July 31, 2003. *Gollie v. Elkay Mining Co.*, No. 03-2131 (4th Cir. April 8, 2004). (Petitioner's App. 1) Aggrieved with the Fourth Circuit's decision, Mrs. Gollie petitions this Court for review.

REASON FOR DENYING THE WRIT

The decisions of the United States Court of Appeals for the Fourth and Sixth Circuits are consistent regarding how an administrative law judge must weigh the different types of medical evidence under 30 U.S.C. § 921(c)(3) when determining the existence of complicated pneumoconiosis.

Title 30 U.S.C. § 921(c)(3) of the Black Lung Benefits Act provides an irrebuttable presumption that a miner's death is contributed to by coal workers' pneumoconiosis if a preponderance of the medical evidence establishes complicated pneumoconiosis or progressive massive fibrosis. The condition which triggers the irrebuttable presumption is established by: chest x-rays classified as revealing opacities greater than one centimeter (§ 921(c)(3)(A)); autopsy or biopsy evidence of massive lesions in the lungs

(§ 921(c)(3)(B)); or a diagnosis by other means such as a CT scan which establishes a condition which could reasonably be expected to yield results described by x-ray, autopsy, or biopsy (§ 921(c)(3)(C)). *See also* 20 C.F.R. § 718.304.

At issue is whether 30 U.S.C. § 921(c)(3) requires a determination if medical evidence under prongs (B) and (C) is equivalent to the objective standard set forth in prong (A). The decisions of the United States Court of Appeals for the Fourth and Sixth Circuits are consistent regarding how an ALJ must weigh the different types of medical evidence under 30 U.S.C. § 921(c)(3) when determining the existence of complicated pneumoconiosis.

In *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro],* 220 F.3d 250 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit discussed the analysis an ALJ must complete before invoking the irrebuttable presumption under 30 U.S.C. § 921(c)(3). The Court held:

> While 30 U.S.C. § 921(c)(3) sets forth, in clauses (A), (B), and (C), three different ways to establish the existence of statutory complicated pneumoconiosis for purposes of invoking the irrebuttable presumption, these clauses are intended to describe a single, objective condition. Otherwise, the three prongs would be describing different conditions, leading to "the irrational result that the determination of whether a miner has [statutory complicated pneumoconiosis] could turn on the method of diagnosis rather than on the severity of his disease." *Double B Mining*, 177 F.3d at 243. Therefore, in applying the standards set forth in each prong, "one must perform equivalency determinations to make certain that regardless of which diagnostic technique is used, the same

> underlying condition triggers the irrebuttable presumption." *Id.*; *see also Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981). And, "[b]ecause prong (A) sets out an entirely objective scientific standard" – i.e., an opacity on an x-ray greater than one centimeter – x-ray evidence provides the benchmark for determining what under prong (B) is a "massive lesion" and what under prong (C) is an equivalent diagnostic result reached by other means. *Double B Mining*, 177 F.3d at 243.

Scarbro, 220 F.3d at 255-56.

In 30 U.S.C. § 921(c)(3)(A), Congress mandated the condition that triggers the irrebuttable presumption is one that creates an opacity greater than one centimeter in diameter on an x-ray. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999). Congress did not define what constitutes a "massive lesion" under prongs (B) and (C). Consequently, the Fourth Circuit held when the condition triggering the irrebuttable presumption is diagnosed by autopsy rather than x-ray, an ALJ must determine whether the autopsy results reveal a condition that would produce opacities of greater than one centimeter in diameter on an x-ray, the only objective benchmark provided by Congress. *Double B Mining*, 177 F. 3d at 243; *Scarbro,* 220 F.3d at 255-56.

The Petitioner contends the United States Court of Appeals for the Sixth Circuit's decision in *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1991), presents a different interpretation of 30 U.S.C. § 921(c)(3). The Petitioner cites *Gray* as noting complicated pneumoconiosis may be established by the finding of massive lesions on autopsy or biopsy without determining if the different types of evidence are

equivalent. (Petition for Cert. at 7). The Petitioner's interpretation of *Gray* is mistaken. The Sixth Circuit's holding in *Gray* does not conflict with the decisions of the Fourth Circuit.

In *Gray,* the Sixth Circuit specifically agreed with the Fourth Circuit's reasoning concerning an equivalency determination between the different types of evidence under § 921(c)(3) stating as follows:

> The one-centimeter standard applicable to x-rays simply does not apply to autopsy evidence. *See Riddle v. Director, Office of Workers' Compensation Programs,* 1995 U.S. App. LEXIS 34215, 1995 WL 715303 (4th Cir. Dec. 6, 1995) (per curiam), where the court explained:
>
> > Dr. Hansbarger's finding of a fibrotic nodule measuring 1.8 centimeters in diameter was insufficient to invoke the irrebuttable presumption found at § 718.304. The regulations provide that an opacity, yielded by an *X-ray,*of more than one centimeter, is sufficient to establish "complicated pneumoconiosis" and invoke the irrebuttable presumption. *See* § 718.304(a). The nodule in this case, however, appeared by autopsy. Under such circumstances, the nodule could only justify invocation of the presumption if a physician provided an opinion that such a nodule would produce an opacity of greater than one centimeter if viewed by x-ray, or an opinion that such a nodule constitutes a "massive lesion."

> Unpublished op. at 4 (emphasis in original). *We agree with the Fourth Circuit's reasoning.* In Mr. Gray's case, Dr. Kleinerman testified that the lesions on the lung-tissue slides would not appear as opacities of greater than one centimeter on an x-ray. He also opined that the nodules on the lung-tissue slides were not the "massive lesions" described in the regulation.

Gray, 176 F.3d at 389-90 (emphasis added).

The Sixth Circuit in *Gray* also acknowledged 30 U.S.C. § 923(b) requires that "all relevant evidence" from each of the different categories of evidence set forth in § 921(c)(3) must be considered. "'[A]ll relevant evidence' means just that – all relevant evidence that assists the ALJ in determining whether a miner suffers from complicated pneumoconiosis." *Id.* at 389. Therefore, the Sixth Circuit's holding in *Gray* does not conflict with, and in fact supports, the Fourth Circuit's decision regarding the requirement of an equivalency determination. As no conflict between the circuits exists on this issue, the Writ should be denied.[3]

The Petitioner also contends the Fourth Circuit's interpretation of the statute is incorrect, and that no equivalency determination is necessary. The Petitioner alleges the Fourth Circuit ignored the word "or" in the text

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[3] The United States Court of Appeals for the Third Circuit has also held an equivalency determination is necessary when there is a question regarding whether nodules found by biopsy or autopsy would correspond to opacities viewed on an x-ray indicating complicated pneumoconiosis. *Clites v. Jones & Loughlin Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981). Thus, the holdings in *Scarbro* and *Double B Mining* are consistent with the holdings of the Sixth and Third Circuits.

of § 921(c)(3). (Petition for Cert. at 5-6) The Fourth Circuit addressed this issue in the *Scarbro* decision as follows:

> Prongs (A), (B), and (C) are stated in the disjunctive; therefore a finding of statutory complicated pneumoconiosis may be based on evidence presented under a single prong. But the ALJ must in every case review the evidence under each prong of § 921(c)(3) for which relevant evidence is presented to determine whether complicated pneumoconiosis is present. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145 (4th Cir. 1993) (A claimant is entitled to the benefit of the § 921(c)(3) "irrebuttable presumption not because he has provided a single piece of relevant evidence, but because he has a 'chronic dust disease of the lung,' commonly known as complicated pneumoconiosis. To make such a determination, the OWCP necessarily must look at all of the relevant evidence presented"); *see also* 30 U.S.C. § 923(b) ("In determining the validity of claims under this part, all relevant evidence shall be considered"); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09 (4th Cir. 2000). Evidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict. Yet, "a single piece of relevant evidence," *Lester*, 993 F.2d at 1145, can support an ALJ's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs conflicting evidence in the record. Thus, even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (A), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (B) or prong (C), then all of the evidence must be considered and evaluated to determine whether the evidence

> as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray. *See Double B Mining*, 177 F.3d at 243-44.

Scarbro, 220 F.3d at 256. Thus, the Fourth Circuit acknowledged prongs (A), (B), and (C) of § 921(c)(3) are stated in the disjunctive. *Scarbro*, 220 F.3d at 256. The Fourth Circuit recognized that a claimant may establish complicated pneumoconiosis with evidence satisfying either prongs (A), (B), or (C), as long as all relevant evidence is considered and weighed. *Id.*

The problem with 30 U.S.C. § 921(c)(3) as noted by the Fourth Circuit is that Congress did not define what constitutes a "massive lesion" for purposes of prongs (B) and (C). *Scarbro*, 220 F.3d at 256. The Fourth Circuit held that because prong (A) of § 921(c)(3) provides the only objective, scientific benchmark, a determination is required regarding whether medical evidence under prongs (B) and (C) is equivalent to the objective standard set forth in prong (A). *Double B Mining*, 177 F. 3d at 243; *Scarbro*, 220 F.3d at 255-56. The ALJ must determine if the lesions found by autopsy, biopsy, or CT scan, would have appeared on a chest x-ray as an opacity greater than one centimeter. *Id.* Thus, the Petitioner's contention that the Fourth Circuit improperly interpreted the statute by ignoring the disjunctive "or" is unfounded. Rather, the Fourth Circuit's decisions provide a rational, legally appropriate interpretation of 30 U.S.C. § 921(c)(3) which does not conflict with the interpretations by any other United States Court of Appeals.

The Petitioner also argues an equivalency determination is unnecessary when a physician diagnoses progressive massive fibrosis (PMF). (Petition for Cert. at 6) Elkay

Mining Company agrees PMF is included in the definition of pneumoconiosis, and that this Court has noted complicated pneumoconiosis involves PMF. *See* 20 C.F.R. § 718.201; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). However, the diagnosis of PMF does not relieve the ALJ of his obligation to require the physicians of record to perform the equivalency analysis prior to determining if the evidence is sufficient to invoke the irrebuttable presumption under § 921(c)(3). Indeed, the mention of PMF by a physician or pathologist of record should trigger the requirement of the equivalency determination analysis if the ALJ finds that physician's opinion well-reasoned.

Finally, the Petitioner argues the autopsy report should control in the determination of the presence of and stage of pneumoconiosis in the absence of accuracy considerations or fraud. (Petition for Cert. at 7) The Petitioner cites an unpublished decision by the Sixth Circuit as support for this position. In that unpublished case, however, the Sixth Circuit held neither the ALJ nor the Benefits Review Board erred by refusing to assign determinative weight to the conclusions of the autopsy prosector because his opinion was not well-reasoned. *Bumgardner v. The Ohio Valley Coal Co.*, No. 98-3753, 1999 U.S. App. LEXIS 15160, *13 (6th Cir. July 2, 1999) (unpublished).

Thus, while autopsy and biopsy evidence are generally considered the "gold standard" in the determination of the existence and extent of coal workers' pneumoconiosis, the mere existence of this evidence does not automatically outweigh all other relevant evidence of record. Pursuant to *Double B Mining* and *Scarbro*, all relevant evidence must be considered in the determination of the existence of the disease and the equivalency analysis must be made where

evidence other than x-ray interpretations is used to diagnose pneumoconiosis in its complicated form.

Furthermore, the autopsy prosector is not automatically entitled to great deference as argued by the Petitioner. (Petition for Cert. at 7) No evidence exists that an autopsy prosecutor's ability to conduct a gross examination renders his opinion superior to those experts who merely reviewed slides and the autopsy report. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 n.6 (4th Cir. 2000) (*citing Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 362-63 (7th Cir.1992) (noting that because "[n]othing in the record suggests that access to the body enhances the accuracy of diagnoses based on autopsy evidence," the ALJ erred in crediting the autopsy prosecutor's opinion over other medical opinions solely because the prosector had such access)). The Petitioner's argument that the prosector's autopsy findings of complicated pneumoconiosis must control without consideration of the other evidence of record and without the required equivalency determination is contrary to applicable law.

The Fourth Circuit's interpretation of 30 U.S.C. § 921(c)(3) as requiring a determination if medical evidence under prongs (B) and (C) is equivalent to the objective standard set forth in prong (A) is consistent with the intent of Congress and the holdings of the other circuits who have addressed this issue. Elkay Mining Company asserts the Fourth Circuit's decisions in *Scarbro* and *Double B Mining* are legally sound and should not be disturbed.

CONCLUSION

For these reasons, Elkay Mining Company requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(8)

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No. 04-39

In the Supreme Court of the United States

MILDRED GOLLIE, PETITIONER

v.

ELKAY MINING CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 411(c)(3) of the Black Lung Benefits Act, 30 U.S.C. 921(c)(3), creates an irrebuttable presumption that a miner is totally disabled by pneumoconiosis or died from the disease where the miner

> is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B).

The question presented is whether "massive lesions in the lung" as used in Section 411(c)(3)(B) includes only those lesions which, if diagnosed by x-ray, would measure greater than one centimeter in diameter.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter*, but is *reprinted in* 92 Fed. Appx. 52. The July 31, 2003, decision of the Benefits Review Board (Pet. App. 4-15) is reported at 22 Black Lung Rep. 1-307. Earlier decisions of the Board (Pet. App. 21-31, 40-53) and the administrative law judge (ALJ) (Pet. App. 16-20, 32-39, 54-67) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3) was entered on April 8, 2004. The petition for a writ of certiorari was filed on July 6, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (BLBA or Act) provides benefits "to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease." 30 U.S.C. 901(a). Disputed claims for benefits are adjudicated in the first instance by administrative law judges, 20 C.F.R. 725.452(a), whose decisions are subject to review by the Department of Labor's Benefits Review Board (BRB), 20 C.F.R. 725.481. Persons aggrieved by BRB decisions may seek judicial review in the courts of appeals. 30 U.S.C. 932(a) (incorporating judicial review provisions contained in Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c)); 20 C.F.R. 725.482(a).

"Coal workers' pneumoconiosis—black lung disease—affects a high percentage of American coal miners with severe, and frequently crippling chronic respiratory impairment." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 (1976). Pneumoconiosis is generally classified as either "complicated" or "simple." Complicated pneumoconiosis "involves progressive massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually produces significant pulmonary impairment and marked respiratory disability." *Id.* at 7. It is distinguished from "simple" pneumoconiosis, which is "generally regarded by physicians as seldom productive of significant respiratory impairment." *Ibid.*

Section 411(c)(3) of the BLBA creates an irrebuttable presumption that "complicated" pneumoconiosis caused a miner's death or total disability if certain criteria are met. That provision states in relevant part:

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis * * * as the case may be.

30 U.S.C. 921(c)(3). Section 411(c)(3)'s presumption "operates conclusively to establish entitlement to benefits" under the BLBA, provided that the pneumoconiosis arose out of employment in a coal mine. *Usery*, 428 U.S. at 11, 22 n.21.

Neither the Act nor the Secretary's regulations specify what constitutes a "massive" lesion in the lung that would establish pneumoconiosis through a biopsy or autopsy diagnosis under clause (B) of Section 411(c)(3). In *Double B Mining, Inc.* v. *Blankenship*, 177 F.3d 240, 243 (1999), the Fourth Circuit held that in order to show that lung lesions are "massive," a claimant must introduce evidence to show that the lesions would "show as opacities greater than one centimeter in diameter" if x-rayed. The Fourth Circuit has justified such an "equivalency" determination under the theory that all three clauses are "intended to

describe a single, objective condition," and that clause (A) sets forth the only objective standard (i.e., an opacity of greater than one centimeter when diagnosed by x-ray). *Eastern Associated Coal Corp.* v. *Director, OWCP (Scarbro)*, 220 F.3d 250, 255 (4th Cir. 2000). The court has further explained that "[l]ogic commands that prongs (A) and (B) be similarly equivalents. Any other rule would lead to the irrational result that the determination of whether a miner has totally disabling pneumoconiosis could turn on the method of diagnosis rather than on the severity of his disease." *Blankenship*, 177 F.3d at 243.

2. Petitioner is the widow of Joe Gollie, who before his death in 1996 worked as a coal miner for 34 years. Pet. App. 56. Petitioner filed a claim for survivor's benefits under the BLBA. Because the claim was contested by respondent Elkay Mining Company, the matter proceeded to a hearing before an ALJ. *Id.* at 56-57.

a. After receiving conflicting medical evidence from the parties, including the opinions of several medical doctors, the ALJ determined that petitioner had successfully invoked Section 411(c)(3)'s irrebuttable presumption. Pet. App. 65. The ALJ relied primarily on the opinion of the pathologist who performed the autopsy of the decedent. *Ibid.* That pathologist "diagnosed progressive massive fibrosis based on his observation of a 5.5 x 5.0 x 3.0 cm. anthracotic lesion," *id.* at 64, and opined that the decedent suffered from complicated pneumoconiosis. *Id.* at 57.

Elkay Mining appealed to the BRB, which vacated the ALJ's decision. Pet. App. 40-53. The BRB noted that none of the doctors specifically opined on whether the lesions observed through autopsy evidence would appear in an x-ray as an opacity of greater than one

centimeter in diameter. *Id.* at 50. Because governing Fourth Circuit precedent required that equivalency determination, the BRB remanded to permit the ALJ to reconsider the evidence. *Id.* at 51.

b. On remand, the ALJ again ruled in petitioner's favor. Pet. App. 32-39. The ALJ relied upon the reports of two pathologists, Drs. Naeye and Kleinerman, both of whom reviewed autopsy slides to determine the cause of death. *Id.* at 37-38. Dr. Naeye had testified that one of the nodules that he viewed on the slides "would look like complicated pneumoconiosis on x-ray," and Dr. Kleinerman had testified that a "1.6 centimeter lesion * * * viewed on the lung slides would be considered progressive massive fibrosis." *Ibid.* The ALJ concluded that the Fourth Circuit's "equivalency standard" had been satisfied, even though neither Dr. Naeye nor Dr. Kleinerman "specifically found that the lesion would be greater than one centimeter in diameter when viewed by x-ray." *Id.* at 38.

Elkay Mining appealed to the BRB, and the BRB vacated and remanded. Pet. App. 21-31. The BRB determined that Dr. Naeye's opinion did not support an equivalency determination, because Dr. Naeye had not specifically testified as to whether the lesion he viewed through autopsy slides would have shown as an opacity greater than one centimeter in diameter if viewed through an x-ray. *Id.* at 28. In addition, the BRB concluded that the ALJ had misread Dr. Kleinerman's testimony, and that he had not in fact testified regarding a 1.6-centimeter lesion viewed through autopsy slides. *Id.* at 29.

c. On second remand, the ALJ concluded that the medical evidence did not give rise to Section 411(c)(3)'s irrebuttable presumption "under the stringent standard enunciated by [the Fourth Circuit]." Pet. App. 19.

The ALJ observed that there was no specific testimony from any doctor showing that the lesions appearing in autopsy evidence would have appeared as opacities of greater than one centimeter in diameter if viewed by x-ray. *Id.* at 18-19. The BRB affirmed. *Id.* at 4-15.

3. In an unpublished per curiam opinion, the court of appeals affirmed "on the reasoning of the [BRB]." Pet. App. 1, 2. In so ruling, the court stated that the BRB's decision was "based upon substantial evidence and [was] without reversible error." *Id.* at 2.

ARGUMENT

The Fourth Circuit interprets "massive lesions" as used in Section 411(c)(3)(B) of the Black Lung Benefits Act, 30 U.S.C. 921(c)(3)(B), to mean only those lesions which, if observed through x-rays, would appear as opacities measuring greater than one centimeter in diameter. Although the correctness of that interpretation is an open question, further review is not warranted at this time. No other court of appeals has had occasion to address the question presented, and the Director, Office of Workers Compensation Programs (OWCP), who administers the statute for the Secretary of Labor, see 30 U.S.C. 902(c), 957; 20 C.F.R. 725.482(b), has not taken a definitive position on the issue.[1]

1. Neither the Act nor the Secretary's implementing regulations provide a definition of the term "massive lesions" as used in Section 411(c)(3)(B). The Secretary has not identified a consensus view within the medical community regarding the criteria to apply in diagnosing pneumoconiosis by autopsy or biopsy. 65 Fed. Reg. 79,936 (2000); 64 Fed. Reg. 54,978 (1999). The Fourth

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[1] Although a party, 30 U.S.C. 932(k); 20 C.F.R. 725.482(b), the Director did not participate in this case in the court of appeals.

Circuit in *Blankenship*, *supra*, held that "massive lesions" must be given content by reference to the objective standard contained in Section 411(c)(3), *i.e.*, the standard governing x-ray evidence contained in clause (A). "Any other rule," the Fourth Circuit believed, "would lead to the irrational result that the determination of whether a miner has totally disabling pneumoconiosis could turn on the method of diagnosis rather than on the severity of his disease." 177 F.3d at 243.

To the extent the Fourth Circuit's interpretation permits equivalency determinations, that interpretation is at least partially correct. Congress obviously intended for the three evidentiary methods in Section 411(c)(3) to produce diagnoses of the same underlying condition, and an equivalency determination serves that congressional intent. Therefore, an administrative law judge should be permitted to conclude that the irrebuttable presumption is met based upon a physician's assertion that lesions viewed by autopsy or biopsy would produce opacities of greater than one centimeter in diameter if viewed through an x-ray. Cf. *Clites* v. *Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981) (sustaining ALJ's finding of complicated pneumoconiosis under clause (C) based upon pathologist's testimony that lesions observed at autopsy would have shown as opacities greater than one centimeter in diameter if viewed through x-ray).

It is less than clear, however, that Section 411(c)(3)(B) *requires* an equivalency determination whenever a claimant introduces autopsy or biopsy evidence. The text's use of the word "or" indicates that a claimant may prove the presence of the disease by satisfying the criteria of clause (B) without necessarily meeting the criteria of clause (A). The Fourth Circuit's

interpretation also is open to the charge that it renders clause (B) of the statute superfluous. If Congress intended, as the Fourth Circuit believed, to require equivalency determinations for autopsy and biopsy evidence, it can be argued that there was no need for Congress to enact clause (B), because clause (C) already requires an equivalency determination whenever "other" evidence is presented, 30 U.S.C. 921(c)(3). By placing autopsy and biopsy evidence in a separate clause from the one governing "other" evidence, Congress arguably signaled its intent for claimants to have greater flexibility in proving the existence of "massive lesions" through autopsy or biopsy evidence.

As the Fourth Circuit recognized in *Eastern Associated Coal Corp.*, 220 F.3d at 259, "Congress chose to use the word 'massive' [in Section 411(c)(3)] in its ordinary sense without giving it a precise statutory or medical definition." Therefore, ALJs should be permitted to determine, based upon all available autopsy or biopsy evidence, whether a claimant has met her burden of showing that a particular lesion is "massive" in comparison to lesions that are too small to support a diagnosis of complicated pneumoconiosis. An equivalency determination is one way to make that showing, but it may not be the only way. Cf. 30 U.S.C. 923(b) ("In determining the validity of claims under this part, all relevant evidence shall be considered.").[2]

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[2] Petitioner argues (Pet. 7) that the pathologist's autopsy report in this case should have been accepted as binding because Section 413(b) of the Act provides that the Secretary must accept an autopsy report presented by the claimant "concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis," unless the Secretary has reason to believe that the report is fraudulent or inaccurate. 30 U.S.C. 923(b). That is not correct. That provision does not trump the Secretary's obliga-

2. Although the Secretary has not endorsed the Fourth Circuit's interpretation of Section 411(c)(3)(B), this Court's review is not warranted at the present time. The Fourth Circuit's interpretation does not conflict with any decision from this Court or any other court of appeals. Petitioner is wrong in asserting (Pet. 4-5) that the Sixth Circuit in *Gray* v. *SLC Coal Co.*, 176 F.3d 382 (1999), has interpreted "massive lesions" as used in Section 411(c)(3)(B) in a manner that conflicts with the Fourth Circuit's interpretation. To the contrary, neither the Sixth Circuit nor any other court of appeals has even considered, much less rejected, the Fourth Circuit's approach.[3]

In *Gray*, the Sixth Circuit stated that, when a lesion or nodule is examined through an autopsy, it may "only justify invocation of the presumption [under Section 411(c)(3)(B)] if a physician provided an opinion that such a nodule would produce an opacity of greater than one centimeter if viewed by x-ray, or an opinion that such a nodule constitutes a 'massive lesion.'" 176 F.3d at 390 (quoting *Riddle* v. *Director, OWCP*, No. 95-1292, 1995 WL 715303, at *2 (4th Cir. Dec. 6, 1995) (70 F.3d 1263) (per curiam). *Gray* was altogether silent,

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tion under another provision of Section 413(b) to consider "all" relevant evidence, including contrary evidence presented by an employer-operator. 30 U.S.C. 923(b); cf. *Gray* v. *Director, OWCP*, 943 F.2d 513, 520 (4th Cir. 1991) (although Section 413(b) requires the Secretary to "accept" a qualified x-ray interpretation submitted by a claimant without subjecting it to a government-funded rereading, an ALJ must nonetheless consider contrary evidence submitted by a mine operator).

[3] Respondent Elkay Mining errs in suggesting that the Third Circuit in *Clites*, *supra*, has held that an equivalency determination is required by clause (B). Rather, that decision stated that such a determination is required by clause (C). 663 F.2d at 16.

however, on the meaning of the phrase "massive lesion," and did not indicate whether the court of appeals disagreed with the rule stated in *Blankenship* that a "massive lesion" must be shown by the criteria of clause (A). Nor did the Sixth Circuit in *Gray* have any occasion to pass on the validity of the Fourth Circuit's decision in *Blankenship* (which had been issued just three days before *Gray*). The physician in *Gray* testified not only that the nodules at issue would not have appeared as opacities greater than one centimeter in diameter if viewed by x-ray, but also that they "were not * * * 'massive lesions.'" *Gray*, 176 F.3d at 390 (citing 20 C.F.R. 718.304).

In the absence of a circuit conflict, the question presented is not appropriate for this Court's review at this time. The BLBA "has produced a complex and highly technical regulatory program," *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991), and the issue here is among the more complex aspects of the program. That complexity counsels in favor of allowing the courts of appeals the opportunity to explain their agreement or disagreement with *Blankenship*'s interpretation of Section 411(c)(3). Should a disagreement arise, this Court can then decide whether to provide a nationally binding resolution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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